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Supreme Court, U.S.
FILED

No. 09-1333 APR 28 2010

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IN THE

Supreme Court of the United States

FERNANDO CANTO,

Petitioner,

—v.—

ERIC H. HOLDER, Attorney General of the United States,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 212(c) of the Immigration and Nationality Act granted the Attorney General broad discretion to waive the deportation of certain aliens. It was repealed in 1996. This Court has held that aliens who entered a plea of guilty to a deportable offense prior to 1996 may continue to rely on Section 212(c) to seek a waiver of deportation., *INS v. St. Cyr*, 533 U.S. 289 (2001). Petitioner Fernando Canto was convicted of a deportable offense prior to 1996 after exercising his right to trial by jury. Are individuals who went to trial entitled to the same relief provided in *St. Cyr* such that they may continue to seek waiver of deportation under Section 212(c) despite its repeal?

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OPINIONS BELOW

The opinion of the Court of Appeals in Mr. Canto's petition for review is published and reported at 593 F.3d 638 (7th Cir. 2010), and reprinted at Pet. App. 1a-14a. The opinions of the Board of Immigration Appeals and the Immigration Judge are reprinted at Pet. App. 14a-18a and Pet. App. 19a-32a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on January 28, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), enacted in 1952, provides, as follows:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily, and not under order of deportation, who are returning to a lawful unrelinquished domicile of seven consecutive years may be admitted in the discretion of the Attorney General . . . The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

Section 212(c) was repealed in 1996 by Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), 8 U.S.C. § 1229b (1996).

INTRODUCTION

Petitioner Fernando Canto is a lawful permanent resident who has resided in the United States since 1971. He supports his wife and stepson and owns his own business, which employs 20 people. In 1983, 27 years ago, Mr. Canto was convicted of three counts of federal counterfeiting and one count of unlawfully carrying a firearm during commission of a felony, for which he was sentenced to two years in prison.

At the time of his conviction, Mr. Canto became deportable, but he also was eligible for so-called "Section 212(c) relief." At the time, Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c)(1995) allowed an alien who was deportable to seek discretionary relief from the Attorney General. Historically, Section 212(c) relief carried with it an approximately a 50 percent chance of success. Pet. App. at 7a. Had Mr. Canto been subject to deportation back then, he would have been able to make a strong showing to the Attorney General for Section 212(c) relief in light of his long-term residence in the United States, his service to the community, and his clean record since his conviction. *See Matter of Marin*, 16 I. & N. Dec. 581, 584 (BIA 1978) (weighing of "social and humane considerations" in reviewing a 212(c) petition).

Congress repealed Section 212(c) relief in 1996. Nevertheless, this Court in *INS v. St. Cyr*, 533 U.S. 289 (2001), held that it is impermissible to deprive an alien of Section 212(c) relief if the alien was convicted by pleading guilty before the repeal of Section 212(c). The Court in *St. Cyr*, however, did not address whether the same rule applies to an alien who was convicted after exercising his right to trial.

The circuits are hopelessly split on the issue. With every regional circuit but one weighing in, most of the circuits have broken into three irreconcilable camps—(1) Section 212(c) relief must always be made available to an alien who was convicted prior to 1996 following a trial; (2) Section 212(c) relief is *never* available under those circumstances; and (3) Section 212(c) relief is available, but only when the alien demonstrates that he actually relied on the continued availability of Section 212(c) in making the decision to proceed to trial. Thus, whether an alien convicted after trial can seek Section 212(c) relief is almost entirely a function of where he happens to live when he is being deported. The circuits have had ample opportunity to reconcile their positions, but they are entrenched in their respective positions. Only this Court can settle the confusion.

The issue is a matter of national importance. Deportation is a serious penalty, bordering on a criminal sanction. Hundreds of thousands of aliens—more than ever before—are being deported every year, with approximately 100,000 each year classified as criminals by the Department of

Homeland Security. Thousands of these individuals received their convictions following trial, and many of them were likely convicted prior to the 1996 repeal of Section 212(c). It is critically important to them—and to the orderly administration of immigration law—to know whether, and under what circumstances, Section 212(c) relief is available to this universe of aliens. The issue is all the more critical, because the courts that are denying Section 212(c) relief are misapplying this Court's precedents on retroactive application of laws.

STATEMENT OF THE CASE

Statutory Background

Section 212(c) relief was first enacted with the passage of the Immigration and Nationality Act of 1952 ("INA"). Although the explicit statutory language applied only to aliens in exclusion proceedings, courts uniformly applied it to all persons in deportation proceedings. *Leal-Rodriguez v. INS*, 990 F.2d 939, 949 (7th Cir. 1993); *Gonzalez v. INS*, 996 F.2d 804, 806 (6th Cir. 1993); *Casalena v. INS*, 984 F.2d 105, 106 n.3 (4th Cir. 1993); *Ghassan v. INS*, 972 F.2d 631, 633 n.2 (5th Cir. 1992); *Joseph v. INS*, 909 F.2d 605, 606 n.1 (1st Cir. 1990); *Tapia-Acuna v. INS*, 640 F.2d 223, 224-25 (9th Cir. 1981) (*overruled by Abebe v. Mukasey*, 554 F.3d 1203, 1207 (9th Cir. 2009) (en banc)); *Vissian v. INS*, 548 F.2d 328 n.3 (10th Cir. 1977); *Francis v. INS*, 532 F.2d 268, 272-73 (2d Cir. 1976); *Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976); *see also Yeung v. INS*, 76 F.3d 337, 341 (11th Cir. 1996).

Congress repealed Section 212(c) in September 1996, when it enacted the IIRIRA. Section 304(b) of IIRIRA replaced Section 212(c) relief with a procedure called "cancellation of removal," *see* 8 U.S.C. § 1229b (1996), and provided that cancellation of removal is not available to an alien convicted of any "aggravated felony." Previously, Section 212(c) relief was available to aliens convicted of "aggravated felon[ies]" so long as they did not serve a term of imprisonment of five years or greater and met the other criteria of the statute.[1]

INS v. St. Cyr

In *St. Cyr*, this Court considered the issue of whether Section 212(c) relief was still available, despite its repeal, to an alien who had accepted a plea prior to 1996 that rendered him eligible at the time to seek relief from deportation. Applying the retroactivity analysis set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), this Court found that:

> Two important legal consequences ensued from respondent's entry of a guilty plea in

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[1] Just prior to IIRIRA, in April 1996, Congress also narrowed the availability of Section 212(c) relief through the 1996 passage of Section 440(d) of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which identified a broad set of offenses that precluded Section 212(c) relief, such as aggravated felonies, drug convictions, or multiple crimes of moral turpitude regardless of the length of their sentence, ineligible for discretionary relief from deportation under former Section 212(c). 110 Stat. 1277 (amending 8 U.S.C. § 1182(c)). Several cases involving Section 212(c) relief analyze the retroactivity of IIRIRA and AEDPA together.

> March 1996: (1) He became subject to deportation, and (2) he became eligible for a discretionary waiver of that deportation under the prevailing interpretation of § 212(c).

St. Cyr, 533 U.S. at 314-15.

The Court concluded that the repeal of Section 212(c) "clearly attache[d] a new disability, in respect to transactions or considerations already past" and thus it was impermissible to deny Section 212(c) relief to individuals such as St. Cyr. *Id.* at 321 (internal marks and citation omitted).

Noting that "whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations," *id.* (internal marks and citation omitted), the Court indicated that in accepting a plea a criminal defendant would be "acutely aware of the immigration consequences of their convictions." *Id.* at 322. The Court further indicated that "[g]iven the frequency with which § 212(c) relief was granted . . . preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer. . . ." *Id.* at 323.

Statement of Facts

Petitioner Fernando Canto is 50 years old and has lived in the United States as a lawful permanent resident for nearly 40 years, since he came to the country at age 10, in 1971. Pet. App. at 3a. As a U.S. resident, he has married, started a family, and

established his own business that employs 20 people. *Id.* While Mr. Canto is a citizen of Mexico, his two sisters and brother are all U.S. citizens and reside in Chicago. His parents are in Puerto Rico, not Mexico. Mr. Canto's wife and stepson depend upon him for financial support, and thus it would constitute an extreme hardship to his family were he to be deported.

Twenty-seven years ago, in 1983, Mr. Canto elected to proceed to trial on charges of federal counterfeiting, in violation of 18 U.S.C. §§ 472 and 473, as well as a related weapons charge. *Id.* Although Mr. Canto was originally charged with six counts, the government dropped one charge during trial and Mr. Canto was acquitted of another. Consequently, he was convicted at trial on three counts of federal counterfeiting and sentenced to two years imprisonment. *Id.* at 21a-22a. Mr. Canto forewent appeal following this trial conviction. *Id.* at 11a.

Mr. Canto's longstanding good character since his conviction in 1983 is undisputed. As the Court of Appeals acknowledged, "by all accounts, his life has been on the straight and narrow." *Id.* at 2a-3a. In April 2005, while reentering the United States from a trip to Mexico, immigration officials detained Mr. Canto and initiated deportation proceedings based on his prior convictions in 1983. *Id.* at 3a. Before the Board of Immigration Appeals ("BIA"), Mr. Canto did not dispute that he was removable, but argued that he should be allowed to petition the Attorney General for a deportation waiver under

Section 212(c), despite its repeal. *Id.* at 22a. The BIA denied Mr. Canto's request. *Id.* at 31a.

Mr. Canto sought review before the Seventh Circuit under 8 U.S.C. § 1252. There, too, he asserted that the repeal of equitable relief under Section 212(c) was impermissibly retroactive as applied to him. *See id.* at 2a. The Court of Appeals rejected that argument, based upon its own precedent in *Montenegro v. Ashcroft*, 355 F.3d 1035, 1036-37 (7th Cir. 2004), holding that aliens who went to trial could never invoke Section 212(c) now that the provision has been repealed. The Court of Appeals' rule is based on the premise that an alien in that position could not have decided to forego any rights in reliance on the continued existence of Section 212(c). Pet. App. at 11a. In so holding, the Court of Appeals acknowledged that its holding was in conflict with other circuits, which have adopted different rules regarding the continued availability of Section 212(c) relief in these circumstances. *Id.* at 9a-11a.

REASONS FOR GRANTING THE PETITION

This Court should exercise certiorari review over this case for at least three reasons. First, and most significantly, 11 of the 12 regional circuits have weighed in on the issue at hand and have reached vastly disparate and confusing results. Second, resolution of this case will provide clarity for a significant and ongoing national problem, as many aliens are similarly situated to Mr. Canto, and therefore will continue to face the risk of near-certain deportation in at least some of the regional

circuits. Third, the Court of Appeals, and several of the other circuits, have decided this important federal question in a manner that conflicts with this Court's guiding precedent on the issue of retroactivity, and particularly the presumption against retroactive application of IIRIRA to Section 212(c) relief set forth in *St. Cyr*.

I. A Significant And Entrenched Split Among Nearly All The Circuits Is Creating Confusion And Leading To Irreconcilable Results.

Every regional circuit but one (the D.C. Circuit) has grappled with the retroactive availability of Section 212(c) relief following a conviction by jury trial. They have reached diametrically opposite results, so that now whether an alien in Mr. Canto's position can seek Section 212(c) relief depends almost entirely on where he happens to reside. Specifically, most of the 11 regional circuits that have dealt with this issue fall into one of three disparate camps:

- On one extreme, the Third, Eighth and Tenth Circuits have found that Section 212(c) relief remains available even when an individual was convicted following trial. These circuits reason that denying relief from deportation to individuals who were convicted when such relief was available would give the IIRIRA impermissible retroactive effect by significantly changing and diminishing those individuals' rights.

- On the other extreme, the First, Sixth, Seventh and Ninth Circuits follow the rule that Section 212(c) relief is unavailable when an individual foregoes a guilty plea and elects to go to trial. These circuits reason that individuals proceeding through trial are ineligible for continued Section 212(c) relief because they could not have relied on the existence of Section 212(c) relief in proceeding to trial.

- Occupying the middle ground, the Fifth and Eleventh Circuits have fashioned a rule that operates on a case-by-case basis, requiring the courts to determine whether the individual at issue "actually relied" on Section 212(c) relief as a predicate to finding whether Section 212(c) continues to be available. These circuits reason that Section 212(c) relief is only available to individuals who can prove that they actually relied on its existence.

- Finally, the Second and Fourth Circuits fall outside of these camps, with the Second Circuit adopting more than one position and the Fourth adopting its own specific rationale on this issue.

Specifically, the first camp containing the Third, Eighth and Tenth Circuits would provide Mr. Canto with relief. Each of these circuits has held that Section 212(c) cannot be retroactively limited by IIRIRA for individuals convicted after trial. *See Lovan v. Holder*, 574 F.3d 990, 993-94 (8th Cir.

2009); *Atkinson v. Attorney General*, 479 F.3d 222, 227 (3d Cir. 2007); *Hem v. Maurer*, 458 F.3d 1185, 1200-01 (10th Cir. 2006); *see also Ponnapula v. Ashcroft*, 373 F.3d 480, 493-94 (3d Cir. 2004) (finding impermissible retroactive application where petitioner turned down a plea agreement for trial). In reaching this conclusion, the Third, Eighth and Tenth Circuits were fully aware of, considered and rejected the other circuits' approaches to this issue. For example, the Third Circuit, found that the requirement of "courts of appeals in other circuits . . . that there be reliance on the prior state of the law in order to make a finding that the elimination of Section 212(c) relief is impermissibly retroactive . . . . runs contrary to our understanding of prior Supreme Court law." *Atkinson*, 479 F.3d at 227 (internal citations omitted). The Third Circuit went on to find that "[t]he Court has never held that reliance on the prior law is an element required to make the determination that a statute may be applied retroactively." *Id.* at 227-28.

The Eighth Circuit agreed that the actual reliance requirement is contrary to this Court's leading retroactivity decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). "Having carefully reviewed these various decisions [of the other circuits], we will follow the Third Circuit's decision in *Atkinson*" and hold that the petitioner was not precluded from Section 212(c) relief. *Lovan*, 574 F.3d at 993-94.

Similarly, the Tenth Circuit also rejected the rules adopted by the other two camps. *Hem*, 458 F.3d at 1191-92. With respect to the middle ground

camp's "requirement that a petitioner demonstrate that he actually relied on § 212(c)," the Tenth Circuit found that such an approach constituted an abandonment of "the Supreme Court's consistent use of objective reliance in the context of retroactivity analysis," *id.* at 1191, and concluded that the requirement "turns the historic presumption against retroactive application of statutes on its head." *Id.* at 1192. The Tenth Circuit similarly rejected the camp that found Section 212(c) unavailable following a trial conviction, finding that this analysis "elevat[es] the quid pro quo of the plea bargain into a prerequisite to an IIRIRA retroactivity challenge . . . [and] is overly constrained, ignoring *Landgraf's* direction that we consider whether a new statute 'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" *Id.* at 1192 (quoting *Landgraf*, 511 U.S. at 280). The Tenth Circuit concluded, "[i]n light of our review of the Court's retroactivity cases, we cannot follow our sister circuits that impose a requirement of subjective/actual reliance." *Id.* at 1196. The Tenth Circuit found that foregoing the right to appeal (as Mr. Canto did here) was sufficient to trigger Section 212(c) relief.

At the other extreme, the First, Sixth, Seventh and Ninth Circuits have categorically held that Section 212(c) is no longer available for individuals who elect to go to trial (the no-relief rule). *Kellerman v. Holder*, 592 F.3d 700, 707 (6th Cir. 2010); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121-22 (9th Cir. 2002), *cert. denied*, 539 U.S. 902 (2003); *Dias v. INS*, 311 F.3d 456, 458 (1st Cir.

2002), *cert. denied*, 539 U.S. 926 (2003); Pet. App. at 11a. The decisions in this camp rest upon the conclusion that no individual could possibly have relied on the availability of Section 212(c) relief when deciding to go to trial. Thus, these circuits conflict sharply with the Third and Eighth Circuits, which have found no reliance at all is necessary. Again, these courts note their departure from the other circuits in reaching their conclusions, and are equally entrenched in their positions. *Kellerman*, 592 F.3d at 707 (finding the petitioner ineligible for waiver because he was convicted by jury, "we decline to adopt the Third Circuit's approach").

Navigating between these two extremes are the Fifth and Eleventh Circuits. They have held that in order for the presumption against retroactivity to apply, an individual must show that he or she actually relied upon the availability of Section 212(c) relief during the trial proceedings. This position has been referred to as the "actual reliance" standard. *Ferguson v. United States Atty. Gen.*, 563 F.3d 1254, 1271 (11th Cir. 2009), *cert. denied*, *Ferguson v. Holder*, ___ S. Ct. ___, No. 09-263, 2010 WL 757697 (Mar. 8, 2010); *Carranza-DeSalinas v. Gonzales*, 477 F.3d 200, 205 (5th Cir. 2007) ("this circuit requires an applicant who alleges continued eligibility for § 212(c) relief to demonstrate actual, subjective reliance . . . . Because the reliance demonstrated must be actual, the determination of retroactive effect is made as to the individual applicant, not as to a group of similarly-situated applicants"); *Hernandez-Castillo v. Moore*, 436 F.3d 516, 519-520 (5th Cir. 2006), *cert. denied*, 549 U.S. 810 (2006) (finding no reliance). These circuits too have

considered and rejected certain decisions of the other circuits. *See Ferguson*, 563 F.3d at 1269-71 (finding "reliance is a core component of *St Cyr's* retroactivity analysis," and holding that while the petitioners in that case could not establish reliance, another who is differently situated might). This actual reliance standard presents its own difficulties given that collecting and presenting evidence to prove "actual reliance" in trials that took place before the 1996 IIRIRA repeal will likely be a difficult task for deportees in these circuits.

The Second and Fourth Circuits fall into none of the above categories. The Second Circuit adopted the no-relief rule of the First, Sixth, Seventh and Ninth Circuits in *Swaby v. Ashcroft*, 357 F.3d 156, 162 (2d Cir. 2004) (decision to go to trial as a matter of law forecloses any argument of detrimental reliance and individual proof of such reliance is therefore not welcome) and *Rankine v. Reno*, 319 F.3d 93, 99 (2d Cir. 2003), *cert. denied sub nom.*, *Lawrence v. Ashcroft*, 540 U.S. 910 (2003). But, in *Restrepo v. McElroy*, 369 F.3d 627, 640 (2d Cir. 2004), the Second Circuit remanded for an evidentiary hearing on whether the petitioner could show actual reliance in that she delayed filing for Section 212(c) relief with the expectation that such a filing could be made at a later date.

The Fourth Circuit takes an altogether different approach. Agreeing with the Third, Eighth and Tenth Circuits, the Fourth Circuit has concluded that reliance is not a relevant inquiry to this Court's retroactivity analysis: "In sum, the historical presumption against retroactive application of

statutes did not require reliance. Neither *Landgraf* nor subsequent Supreme Court authority imposes any such requirement. And we believe that the consideration of reliance is irrelevant to statutory retroactivity analysis." *Olatunji v. Ashcroft*, 387 F.3d 383, 394 (4th Cir. 2004). However, in *Chambers v. Reno*, the Fourth Circuit concluded that the petitioner's decision to go to trial was not sufficiently impacted by the repeal of Section 212(c) to trigger ongoing Section 212(c) availability. 307 F.3d 284, 293 (4th Cir. 2002).

Given these disparate results, the time is ripe to grant certiorari. The split on this issue is well developed, and the contours of the disagreement among the circuits will not appreciably change with future decisions, given that almost every circuit has considered this issue, weighed the other circuits' reasoning on the issue and published a decision accepting or rejecting those other analyses as it sees fit.[2] There is no reason for an immigrant facing deportation in Boston to have no prospect for Section 212(c) relief where a similarly situated immigrant in

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[2] Indeed, the circuit split that exists with respect to this issue is actually deeper than the split that preceded this Court's decision in *St. Cyr*. There, the Court found that the issue of a Section 212(c) availability following a guilty plea had split eight circuits, as opposed to the eleven circuits that have weighed in on this issue. *St. Cyr*, 533 U.S. at 293 n.1. This case is also a more attractive case for *certiorari* review than *St. Cyr* itself was because it presents the issue of Section 212(c) relief following a trial conviction without any other complicating legal issues. That was not the case in *St. Cyr*, which required resolution of a preliminary issue regarding whether *habeas corpus* jurisdiction exists over deportation proceedings under AEDPA and IIRIRA prior to reaching the Section 212(c) issue. *Id.* at 298-310.

Philadelphia could obtain such relief. Similar disparities exist across the country as the circuit split on this issue applies to every U.S. state. As this case provides an opportunity for the Court to resolve this wide variation in the legal landscape, certiorari should be granted.

II. This Is An Issue Of National Importance.

This case raises issues of profound national importance. A large and increasing number of individuals are facing deportation today with limited avenues for relief outside of Section 212(c). In 2008 alone, the Department of Homeland Security removed 358,886 aliens, 97,133 of whom the Department identified as "criminals." DEP'T OF HOMELAND SECURITY, IMMIGRATION ENFORCEMENT ACTIONS, 3-4 (July 2009), *available at* www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf. This marked a 17% increase in the total number of aliens removed from this country relative to 2007, and the sixth year-on-year increase in total removals by the Department. *Id.* at Table 2. Now, absent Section 212(c) relief, "[u]nder contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses." *Padilla v. Kentucky*, ___ S.Ct. ___, No. 08-651, 2010 WL 1222274, *5 (Mar. 31, 2010).

Prior to its repeal, Section 212(c) relief was a check on the expansion in the use of deportation proceedings. Indeed, as this Court noted, Section 212(c) relief was used "to prevent the deportation of over 10,000 noncitizens during the 5-year period prior to [the] 1996" IIRIRA. *Padilla*, 2010 WL 1222274, at *5 (citing *St. Cyr*, 533 U.S. at 296).

The fact that Section 212(c) has been repealed does not lessen the importance of this issue. Given that approximately 68,000 felony convictions each year are obtained through trial in state court alone and that, on average, these felony convictions are for less than five years imprisonment,[3] it is logical to conclude that the class of individuals that remain affected by Section 212(c)'s repeal is a significant number potentially numbering in the thousands.

Moreover, the burden caused by the uncertainty regarding the availability of Section 212(c) relief extends far beyond individuals facing actual deportation proceedings. As Mr. Canto's own circumstances illustrate, individuals in Mr. Canto's position are likely to be well-settled in this country and have jobs, families and ties to their communities, all of which would be impacted by

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[3] *See* SEAN ROSENMERKEL, ET AL., BUREAU OF JUSTICE STATISTICS, UNITED STATES DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURT, 2006- STATISTICAL TABLES 1, § 4 (December 2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf (6% of the 1,132,290 felony convictions in state court come by way of jury and bench trial, rather than plea, and the average sentence for all state court felony convictions was four years and 11 months in 2006).

unwarranted deportation. They could live for many years with the fear of deportation lingering and, with the current state of the law, lack of clarity as to their right to seek relief from deportation. The lack of clarity regarding Section 212(c) relief impacts the Department of Homeland Security as well, which is expending resources in identifying and prosecuting deportation proceedings that may be completely unnecessary should this Court find that these individuals are eligible for Section 212(c) relief. Nor is this issue likely to end by itself anytime soon, as individuals convicted at the age of twenty just prior to the 1996 repeal of Section 212(c) would only be in their thirties today. As the numerous decisions among the circuits over the last eight years demonstrate, the issue of Section 212(c) relief will therefore doubtlessly recur as these individuals continue to leave and reenter the United States throughout their adulthood.

Finally, these individuals should not find themselves facing deportation without Section 212(c) relief simply because they elected to proceed to trial rather than accept a guilty plea. The Sixth Amendment guarantees a criminal defendant a right to a trial by jury, and is a fundamental guarantee under the Bill of Rights "reflect[ing] a profound judgment about the way law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). The exercise of this core constitutional right should not be penalized after the fact through selective retroactive application of IIRIRA, particularly where the penalty—deportation—could very well be the *most* important part of a criminal defendant's punishment:

> These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

Padilla, 2010 WL 1222274, *5 (footnote omitted). Just as a noncitizen defendant has a right to accurate legal advice regarding the likelihood of deportation following a conviction, so too should a noncitizen defendant have the right to make reasoned decisions about whether or not to exercise the constitutional right to trial without the unforeseeable and retroactive imposition of deportation.

III. The Court Of Appeals And The Other Circuits To Reach Similar Conclusions Have Misapplied This Court's Precedent On Retroactivity.

The Court of Appeals, and the circuits on which it relied, has decided an important federal question in a manner that is at odds with this Court's applicable precedent. In *Landgraf*, this Court set forth the applicable test to determine whether a statute is impermissibly retroactive. The Court was careful to

point out that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." 511 U.S. at 265. The Court explained:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."

Id. (citation omitted). To implement this presumption, the Court established a two-part test for determining the appropriateness of retroactive application of a statute. First, the reviewing court must determine whether Congress intended retroactive application. *Id.* at 280. Second, if Congress expressed no clear intent, the court must consider whether applying the law retroactively would have an impermissible retroactive effect, *i.e.*, whether it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," *id.*, or as this Court further elaborated in *St. Cyr*, whether "it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attached a new disability." *St. Cyr*, 533 U.S. at 321.

With respect to the first question, as the Court of Appeals noted, "the *Landgraf* analysis here is the same as it is in *St. Cyr*—Congress did not state with certainty that it intended the repeal of section 212(c) to apply retroactively." Pet. App. at 9a. Consequently, with the first question answered in the negative, the court must turn to the second part of the test. It is here where the Court of Appeals and several of its sister circuits, fail to faithfully implement this Court's precedent. Rather than asking the question this Court has set out as the second prong of the two-part test, and considering whether the repeal of Section 212(c) relief took away a right or created a disability for Mr. Canto, the Court of Appeals launched immediately into a discussion of whether Mr. Canto relied on that relief in going to trial rather than accepting a plea. *Id.* at 9a-14a. First, it should be noted that Congress made no distinctions between trials and guilty pleas in fashioning Section 212(c) relief—it was available to all regardless of their path to conviction. Second, this Court has never imposed such a test into the retroactivity analysis. *See, e.g.*, *Landgraf*, 511 U.S. at 270-72 (collecting retroactivity precedent); *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 946-47 (1997) (same). Rather, as noted by the Third Circuit, the analysis should have proceeded as follows:

> Prior to IIRIRA's enactment, [Petitioner] remained free to apply for a waiver under section 212(c) despite his conviction of an aggravated felony. After IIRIRA, he lost that right; applying basic principles of retroactivity, IIRIRA attached a new legal

> consequence to [Petitioner's] conviction: the certainty—rather than the possibility—of deportation. Such a change in legal consequences based on events completed before IIRIRA's enactment constitutes an impermissible retroactive effect.

Atkinson, 479 F.3d at 230.

The Court of Appeals erred in applying this Court's retroactivity precedent by focusing on whether Mr. Canto relied on existing law, rather than finding that new "legal consequences" attached to Mr. Canto's existing rights. While this Court has suggested that reliance can be considered as a factor in determining whether a law has retroactive effect, stating that "courts should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations," *Martin v. Hadix*, 527 U.S. 343, 358 (1998) (quoting *Landgraf*, 511 U.S., at 270), the Court of Appeals' finding that reliance is a condition precedent to finding impermissible retroactivity is inconsistent with the Court's decision in *Landgraf* and its progeny and misreads *St Cyr*.

Certiorari should be granted to correct this misapplication of the Court's precedent on this important issue, which affects not only the substantial rights of Mr. Canto, but all others similarly situated.

CONCLUSION

Certiorari should be granted to resolve the deep and entrenched conflict that has arisen among the circuit courts regarding the continued availability of Section 212(c) relief for individuals that exercise their right to trial. Review is also warranted to address the misapplication of this Court's precedent on the issue of retroactivity of the IIRIRA. As this is a significant national issue that will not resolve itself without this Court's intervention, the petition for writ of certiorari should be granted.

Respectfully submitted,

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April 28, 2010

APPENDIX

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 08-4272

Argued Sept. 18, 2009
Decided Jan. 28, 2010

FERNANDO CANTO,

Petitioner,

—v.—

ERIC. H. HOLDER, JR.,
Attorney General of the United States,

Respondent.

JAMES C. TEN BROECK, JR. (argued), Chicago, IL *for Petitioner.*

KEITH I. MCMANUS, JESSICA E. SHERMAN (argued), Department of Justice, Washington, DC *for Respondent.*

Before EASTERBROOK, *Chief Judge,* and WILLIAMS and TINDER, *Circuit Judges.*

WILLIAMS, *Circuit Judge.*

Fernando Canto was convicted of counterfeiting over two decades ago. Since then, by all accounts, his life has been on the straight and narrow. After returning from a trip abroad, he was detained and found to be deportable because of his counterfeiting conviction. Canto concedes deportability but argues that the differing treatment of foreign and domestic convictions violates his equal protection rights—foreign convictions over fifteen years old cannot be a basis for deportation, whereas similar domestic convictions can. Because several rational bases, including concerns about the rights and protections of foreign justice systems as compared to our own, may have motivated Congress in drawing this distinction, Canto's argument fails. Canto also argues that the repeal of section 212(c) of the Immigration Code, which allowed certain deportable aliens to petition the Attorney General for relief from deportation, was impermissibly retroactive as applied to him. Our precedent has already addressed this question and found that aliens who went to trial did not forgo any rights in reliance on the continued existence of section 212(c), so it was not impermissibly retroactive. We therefore deny Canto's petition for review.

I. BACKGROUND

Fernando Canto, a native of Mexico, was admitted to the United States as a lawful permanent resident in 1971. Since his arrival in this country, he has married, started a family, and owned his own business that employed twenty people. In 1983, however, he was convicted, after a trial, of two counts of federal counterfeiting in violation of 18 U.S.C. §§ 472 and 473, and a related weapons charge. He was sentenced to two years' imprisonment.

Over two decades later, upon reentering the United States from a trip to Mexico in April 2005, immigration officials detained him and charged him with removability as a result of his commission of a crime of moral turpitude. Canto does not dispute that federal counterfeiting is a crime of moral turpitude, nor does he dispute that a crime of moral turpitude fits the definition of an "aggravated felony," for which he is removable under 8 U.S.C. § 1252(a)(2)(c). Although Canto conceded removability before the Immigration Judge and the Board of Immigration Appeals ("BIA"), he argued that he should be allowed to petition the Attorney General for a deportation waiver under section 212(h) and now-repealed section 212(c) of the Immigration Code. The BIA denied his petition and he now appeals.

II. ANALYSIS

A. Equal Protection

Canto first argues that the definition of "aggravated felony" in the Immigration Code violates the equal protection component of the Due Process Clause. The Immigration Code defines "aggravated felony" to include all domestic aggravated felony convictions but only those foreign felony convictions for which the petitioner had completed his term of imprisonment during the fifteen years prior to the commencement of removal proceedings against him. *See* 8 U.S.C. § 1101(a)(43). Because Canto's domestic conviction for counterfeiting was over twenty years old in March 2005, had it been a foreign conviction, he would not have been removable. He contends that this differing treatment of foreign and domestic convictions violates equal protection principles.

Since this classification involves neither a fundamental right nor a suspect classification, it is accorded a strong presumption of validity and need only be supported by a rational basis. *Heller v. Doe,* 509 U.S. 312, 319-20, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). Federal classifications in immigration matters are subject to "relaxed scrutiny," *Nyquist v. Mauclet,* 432 U.S. 1, 7 n. 8, 97 S.Ct. 2120, 53 L.Ed.2d 63 (1977), and should be found valid unless they are "wholly irrational," *Mathews v. Diaz,* 426 U.S. 67, 83, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976). Further, "review of decisions made by Congress in the immigration context is extremely limited, and this is particularly true where the challenged legislation sets criteria

for the admission or expulsion of aliens." *Lara-Ruiz v. I.N.S.*, 241 F.3d 934, 946 (7th Cir.2001). If any plausible reason could provide a "rational basis for Congress' decision to treat the classes differently, our inquiry is at an end, and we may not test the justification by balancing it against the constitutional interest asserted by those challenging the statute." *Id.*

Congress could have had several rationales for exempting older foreign convictions from the Immigration Code's reasons for removability. For example, Congress may have been concerned about the legal protections afforded to defendants in other countries. Congress cannot know how reliable a foreign country's justice system is. Our justice system, constitutional rights, and protections against wrongful conviction differ from those rights offered in Canada, which differ from those rights offered in Botswana, which differ from those rights offered in almost every country in the world. This is especially true when the foreign law in question is constantly evolving, and subject to change within a fifteen-year period. So, it is perfectly rational that Congress might not want to prevent an alien from seeking a waiver because of a foreign conviction based on different laws without analogous constitutional guarantees.

Congress also might have exempted older foreign convictions because it felt that an alien who committed a crime in the United States forfeited his right to avail himself of the benefits of living in this country because his actions showed a lack of respect for United States law, whereas an alien who committed a crime in another country did not show a similar disrespect. *See Klementanovsky v.*

Gonzales, 501 F.3d 788, 794 (7th Cir.2007). Canto retorts that this court should give just as much credence to foreign law as it does to domestic law because, among other things, almost every foreign country has a lower crime rate than the United States. This argument is not persuasive as our review is limited to whether Congress acted with a rational basis and it need not involve an analysis of the efficacy of foreign law. And if older foreign convictions were treated the same as domestic convictions for purposes of removability, Canto would still be removable. Further, the Supreme Court has already expressed hesitation in giving credence to the law of foreign nations in the manner that Canto suggests. *See Small v. United States*, 544 U.S. 385, 399, 125 S.Ct. 1752, 161 L.Ed.2d 651 (2005). In any event, there very well might be a variety of other reasons for Congress's decision, but the two we list are rational, and enough for us to conclude that 8 U.S.C. § 1101(a)(43) does not violate the equal protection component of the Due Process Clause.

B. Retroactivity of the Repeal of Section 212(c)

Under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996), deportable aliens who had accrued seven years of lawful permanent residence in the United States could request discretionary relief from deportation by arguing that the equities weighed in favor of allowing them to remain in the United States. Even an alien deportable because he had been convicted of an aggravated felony (such as Canto), *see* 8 U.S.C. § 1227(a)(2)(A)(iii) (1994), was

eligible for such discretionary relief if he served a term of imprisonment less than five years. 8 U.S.C. § 1182(c). Section 212(c) was repealed in September 1996, when Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). Section 304(b) of IIRIRA repealed § 212(c) relief entirely, replacing it with a procedure called "cancellation of removal," *see* 8 U.S.C. § 1229b (1996), and providing that cancellation of removal is not available to an alien convicted of any aggravated felony. This provision was consistent with section 440(d) of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), enacted shortly before IIRIRA, which rendered aliens convicted of aggravated felonies, regardless of the length of their sentence, ineligible for discretionary relief from deportation under former section 212(c). *See* 8 U.S.C. § 1182(h).

Had section 212(c) not been repealed, Canto would be eligible to apply to the Attorney General for equitable relief, and, statistically, he would have approximately a fifty percent chance of success. *See Hem v. Maurer,* 458 F.3d 1185, 1188 (10th Cir.2006). Canto argues that the repeal of section 212(c) should not be allowed to apply retroactively to him. The Supreme Court has already addressed the retroactive application of this repeal in the context of a deportable alien who pled guilty to a crime of moral turpitude pursuant to a plea agreement that specified that he would receive less than five years' imprisonment. In *I.N.S. v. St. Cyr,* 533 U.S. 289, 326, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), the Supreme Court held that discretionary relief under former section

212(c) "remains available for aliens . . . whose convictions were obtained through plea agreements and who . . . would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." In reaching this conclusion, the Court applied the *Landgraf* formula, which requires a court to first see if Congress unambiguously intended the legislation to apply retroactively, and, if not, to examine whether it attaches new legal consequences to prior events because its application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *See Landgraf v. USI Film Products,* 511 U.S. 244, 280, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). The *St. Cyr* Court concluded that Congress did not provide a sufficiently clear command with respect to the temporal reach of the repeal of former § 212(c) by IIRIRA section 304(b), such that the Court could not unambiguously conclude that Congress intended it to apply retroactively. *St. Cyr,* 533 U.S. at 319, 121 S.Ct. 2271. The Court then concluded that the retroactive application of IIRIRA section 304(b) would have an impermissible retroactive effect on aliens who had pled guilty prior to the repeal of section 212(c) because the repeal fundamentally changed the rights they had at the time of their convictions. *Id.* The Court highlighted the quid pro quo of the criminal plea agreement, and reasoned that because aliens like St. Cyr "almost certainly relied upon that likelihood of receiving discretionary relief under section 212(c) in deciding whether to forgo their right to a trial, the elimination of any possibility of section

212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325, 121 S.Ct. 2271; *see also id.* at 322, 121 S.Ct. 2271 ("Given the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA, preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial."). So, the Court held that the repeal of section 212(c) would not apply retroactively to petitioners who had accepted plea agreements.

The Court, however, did not address whether relief under former section 212(c) would be available to petitioners, such as Canto, who did not accept a plea agreement but instead pleaded not guilty and were convicted after a trial. Although the Supreme Court did not embark on this analysis, it did much of the legwork for us. The *Landgraf* analysis here is the same as it is in *St. Cyr*—Congress did not state with certainty that it intended the repeal of section 212(c) to apply retroactively, and the repeal fundamentally changed the rights of certain petitioners. The only question remaining is whether those petitioners who opted to go to trial "relied" on the continued existence of equitable relief under section 212(c) in foregoing a legal right. The circuits are split on what type of reliance is necessary. The Fourth and Eleventh Circuits have employed an actual reliance standard, under which the petitioner must show that he actually subjectively relied on the prior law in the criminal proceedings resulting in his conviction. *See Ferguson v. United States Atty. Gen.*, 563 F.3d 1254, 1268 (11th Cir.2009);

Chambers v. Reno, 307 F.3d 284, 290-91 (4th Cir.2002). The Third, Eighth, and Tenth Circuits have employed an objective reliance standard, under which it is only necessary to establish that relevant circumstances gave rise to interests upon which it would have been objectively reasonable for a petitioner to rely on the prior law in deciding to give up a legal right. *See Lovan v. Holder,* 574 F.3d 990, 993-94 (8th Cir.2009) (holding that repeal of section 212(c) had an impermissibly retroactive effect as applied to aliens convicted by either guilty plea or by jury); *Hem v. Maurer,* 458 F.3d 1185, 1192 (10th Cir.2006) (same); *Ponnapula v. Ashcroft,* 373 F.3d 480, 493 (3d Cir.2004) (same). The First and Ninth Circuits have not differentiated between the two types of reliance and have categorically held that petitioners who chose to go to trial could not possibly have relied on the continued existence of section 212(c) relief. *Dias v. I.N.S.,* 311 F.3d 456, 458 (1st Cir.2002); *Armendariz-Montoya v. Sonchik,* 291 F.3d 1116, 1121 (9th Cir.2002). The Second Circuit appears conflicted on the issue. In two cases, it has agreed with the First and Ninth Circuits that a petitioner who goes to trial cannot later argue that he relied on the continued existence of section 212(c) in opting to reject a plea agreement. *See Swaby v. Ashcroft,* 357 F.3d 156, 162 (2d Cir.2004); *Rankine v. Reno,* 319 F.3d 93, 99 (2d Cir.2003). Then, in *Restrepo v. McElroy,* 369 F.3d 627, 640 (2d Cir.2004), it held that a defendant who went to trial but later argued that his "reliance" on the continued existence of section 212(c) did not involve his decision to go to trial, but rather his decision to not immediately file a section 212(c)

request after being convicted, was entitled to an evidentiary hearing to determine whether he actually relied on section 212(c)'s continued existence. *Accord Carranza-De Salinas v. Gonzales*, 477 F.3d 200, 206-09 (5th Cir.2007).

We have agreed with the First and Ninth Circuits. *See Montenegro v. Ashcroft*, 355 F.3d 1035, 1036-37 (7th Cir.2004) (per curiam). In *Montenegro*, we held that relief under former section 212(c) only remains open to: (1) petitioners who pled guilty prior to section 212(c)'s repeal; or (2) "aliens who conceded deportability before AEDPA's enactment, with the expectation that they could seek waivers under § 212(c)." *Id.* at 1037. Canto fits in neither category. Moreover, we expressly found a petitioner could not possibly have relied on the continued existence of section 212(c) relief in deciding to go to trial. *Id.* ("But this exception does not apply to aliens like Montenegro who chose to go to trial; such aliens did not abandon any rights or admit guilt in reliance on continued eligibility for § 212(c) relief.").

Here, Canto makes a slightly more nuanced argument, relying on *Hem*, 458 F.3d at 1192, that he forwent his legal right to appeal his conviction in reliance on his continued ability to seek section 212(c) relief. The distinction between our analysis in *Montenegro* and that of the Third, Eighth, and Tenth Circuits, which have found that the repeal of section 212(c) to be impermissibly retroactive as applied to petitioners who went to trial, is one of fine line drawing. With the exception of the Fourth Circuit, the circuits are generally in agreement that the Supreme Court prefers a categorical approach over an individualized analysis when

deciding whether an alien relied on the continued existence of section 212(c) in forgoing a legal right. It cannot be disputed that the Supreme Court took a categorical approach in *St. Cyr*—it found that the category of aliens who accepted plea agreements prior to the repeal of section 212(c) relied on its continued existence in deciding to accept the plea. *See Hem*, 458 F.3d at 1199 ("[T]he Court established an objective, categorical scheme for determining if a statute has impermissible retroactive effects. The Court generalized to a category of affected aliens from the facts of the case before it, asking whether the repeal of § 212(c) would have an 'impermissible retroactive effect for aliens who, like [St. Cyr], were convicted pursuant to a plea agreement at a time when their plea would not have rendered them ineligible for § 212(c) relief.'" (citation and quotation omitted)); *Restrepo*, 369 F.3d at 640 ("In *St. Cyr II*, instead, the Supreme Court took a categorical approach. . . . We have not had briefs or oral arguments on whether the approach taken by the Supreme Court in *St. Cyr II* or a more individualized one is appropriate in the circumstances before us.").

In the aftermath of *St. Cyr*, faced with many different reliance arguments, courts either were forced to create new categories and decide whether the group of individuals in them would have relied on the continued existence of section 212(c) relief, or abandon the categorical approach and evaluate reliance on a case-by-case basis. *See Restrepo*, 369 F.3d at 642 (Calabresi, J., concurring). For example, the Third Circuit concluded that the category of aliens who turned down plea agreements but went to trial relied on the con-

tinued ability to seek section 212(c) relief such that its repeal was impermissibly retroactive with respect to them. *See Ponnapula,* 373 F.3d at 494. And the Tenth Circuit concluded the same about the category of aliens who went to trial (even in the absence of a plea agreement) but gave up their right to appeal their conviction when a successful appeal could have deprived them of their ability to seek section 212(c) relief. *See Hem,* 458 F.3d at 1199-1200.

We, too, have followed the categorical approach, finding that the category of aliens who went to trial did not forgo any possible benefit in reliance on section 212(c). *See Montenegro,* 355 F.3d at 1037. This category necessarily includes those aliens that went to trial, but chose not to appeal. The Executive Office for Immigration Review has promulgated regulations consistent with our interpretation. *See* Exec. Office for Immigration Review, Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997, 69 Fed.Reg. 57826 (Sept. 28, 2004) (codified at 8 C.F.R. pts. 1003, 1212, 1240 (2006)). Even if we were to regard the group of aliens who did not appeal as a separate category, we would be hesitant to find that they relied on section 212(c). Although, as the Supreme Court recognized in *St. Cyr,* it is more than likely that those aliens faced with plea agreements contemplated their ability to seek section 212(c) relief, the same logic cannot necessarily be extended to those aliens convicted at trial. It is a stretch to think that the majority of aliens who went to trial and received a sentence of less than five years would forgo their right to appeal on the off chance that they would be suc-

cessful, get retried, be convicted again, and then receive a sentence greater than five years. So, it would be more likely than not that the existence of section 212(c) did not affect their decision about whether to appeal their convictions. Therefore, we must affirm the BIA's decision.

III. CONCLUSION

Accordingly, we DENY Canto's petition for review.

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

File: A019 725 989

Chicago, IL

November 26, 2008

IN RE: FERNANDO CANTO

IN REMOVAL PROCEEDINGS
APPEALS AND MOTION

APPLICATION: Section 212(c) waiver; 212(h) waiver

ON BEHALF OF RESPONDENT:
JAMES C. TEN BROECK JR., *Esquire*

ORDER

The respondent, a native and citizen of Mexico, has appealed from the Immigration Judge's decision dated May 24, 2007. The respondent also requests "reopening" based upon evidence showing that he waived his right to appeal his 1983 criminal convictions. The motion—which we will treat as a motion to remand—will be denied and the appeal will be dismissed. *See* 8 C.F.R. § 1003.2(c)(4).

We will affirm pretermission of the respondent's application for a waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The Immigration Judge correctly found that the respondent is ineligible for this relief with respect to his 1983 aggravated felony convictions for counterfeiting because the respondent was convicted following a trial by jury, and the respondent has not shown that he affirmatively abandoned any rights in reliance on the possibility of section 212(c) relief. *See United States v. De Horta Garcia,* 519 F.3d 658, 661 (7th Cir.) *cert. denied,* — S. Ct. —, 2008 WL 2717598 (Nov. 3, 2008). The respondent has now asserted on appeal that he rejected a plea offer and later decided to forego an appeal in reliance on the availability of a section 212(c) waiver. However, we find insufficient testimony or other evidence in the record of proceedings to support this claim, even if we were to assume *arguendo* (without deciding) that a sufficiently substantiated claim of having foregone an appeal in reliance on section 212(c) would render the subsequent repeal of that provision impermissibly

retroactive as applied to the alien in question. (The respondent does not explain how *rejecting* a *plea* offer could ever constitute detrimental reliance).

There is no indication that the court docket sheet which the respondent has submitted in support of remanding, to show that he waived appeal of his 1983 convictions, is evidence that was undiscoverable and could not have been presented before the Immigration Court. Morever, the docket sheet provides no indication that the respondent acted specifically in reliance on the availability of section 212(c) relief. Consequently, we find that the docket sheet does not constitute new evidence and does not demonstrate *prima facie* eligibility for the relief sought. *See* 8 C.F.R. § 1003.2(c); *INS v. Abudu,* 485 U.S. 94 (1988). We will therefore deny the respondent's motion to remand on the basis of this evidence.

Further, we agree with the Immigration Judge that the language of the 1996 amendments to the Act which make a section 212(h) waiver unavailable to a lawful permanent resident convicted of an aggravated felony unambiguously permits retroactive application of the bar to aliens such as the respondent (I.J. at 4). *See Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 131 (2d Cir. 2005); *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1054-55 (9th Cir. 2005). The respondent's argument that the term "aggravated felony" cannot be applied retroactively to his convictions is similarly without merit. *See Flores-Leon v. INS*, 272 F.3d 433, 439 (7th Cir. 2001). Finally, we lack jurisdiction to consider the respondent's argument that

the 1996 amendments unconstitutionally violate equal protection principles.

Accordingly, the respondent's motion to remand is denied and his appeal is dismissed.

LINDA S. WENDTLAND
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
CHICAGO, ILLINOIS

May 24, 2007

File: A19-725-989

In the Matter of:

FERNANDO CANTO,

Respondent.

IN REMOVAL PROCEEDINGS

CHARGE: Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(2)(A)(i)(I)—Inadmissible due to having been convicted of a crime involving moral turpitude.

APPLICATIONS: Section 212(h) of the INA, 8 U.S.C. § 1182(h)—Waiver of inadmissibility under Section 212(a)(2)(A)(i)(I).

Section 212(c) of the INA, 8 U.S.C. § 1182(c) (1990) (repealed)—Waiver of inadmissibility.

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DECISION OF THE IMMIGRATION JUDGE

The respondent seeks a waiver of inadmissibility under Section 212(h) or, alternatively, the now-repealed Section 212(c) of the INA. For the reasons below, I deny his applications.

I. BACKGROUND

The respondent is forty-seven-year-old married male native and citizen of Mexico. These proceedings originated when the respondent presented himself for inspection as a returning legal permanent resident on April 23, 2005, at O'Hare International Airport, Chicago, Illinois. (*See* Ex. 1.) On June 15, 2005, the Department of Homeland Security ("DHS" or "the Government") issued a Notice to Appear ("NTA") that initiated removal

proceedings against the respondent. (*Id.*) The NTA charged that the respondent is an arriving alien[1] who is inadmissible under Section 212(a)(2)(A)(i)(I) of the INA, due to having been convicted of a crime of moral turpitude. (*Id.*)

According to the respondent, at some point in 1971, he was admitted to legal permanent resident status.[2]

On February 18, 1983, at the conclusion of a trial by jury, he was found guilty of four felony counts: two counts of "knowingly, willfully and unlawfully. . . sell[ing], exchang[ing], transfer-[ring] and deliver[ing] false and counterfeited obligations with the intent that the same be passed, published and used as true and genuine," in violation of 18 U.S.C. § 473; one count of "keep[ing] in his possession and attempt[ing] to sell falsely

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[1] Because it was alleged (and eventually, conceded) that the respondent committed a crime involving moral turpitude as defined by Section 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182 (a)(2)(A)(i)(I), he is properly considered as seeking admission to the United States as an "arriving alien" upon his latest entry, even though he is a legal permanent residence. "An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission in the United States for purposes of the immigration laws unless the alien . . . has committed an offense identified in section 212(a)(2) [including crimes involving moral turpitude]. . ." INA § 101(a)(13)(C)(v), 8 U.S.C. § 1101(a)(13)(C)(v). The respondent falls under this exception, and therefore is to be considered an arriving alien.

[2] Neither party has submitted any documentary evidence of the respondent's date of admission to permanent residence. The Government has not challenged the respondent's claimed date of admission. Therefore, for the purposes of this decision, I will accept the respondent's testimony that he was admitted as a legal permanent resident in 1971.

made and counterfeit obligations of the United States," in violation of 18 U.S.C. § 472; and one count of unlawfully carrying a firearm during a commission of a felony, in violation of 18 U.S.C. § 924(c)(2). (*See* Group Ex. 2, record of conviction.) He was sentenced to two years of imprisonment for one count of counterfeiting in violation of 18 U.S.C. § 473 and five years of probation for the remaining counts (to run consecutively after the imprisonment imposed and concurrently with each other). (*Id.*, Judgment and Probation/Commitment Order.)

The respondent through counsel has admitted the factual allegations contained in the NTA and conceded inadmissibility and, as a result, removability. Under Section 240(c)(2) of the INA, 8 U.S.C. 1229a(c)(2), an applicant for admission has the burden of establishing that (s)he is "clearly and beyond doubt entitled to be admitted and is not inadmissible under Section 212." Through his admissions, the respondent has conceded that he is unable to meet this burden. Therefore, based on his admissions and the documentary evidence in the record, I find the respondent removable as charged.

Because the respondent has been found inadmissible, he seeks to obtain a waiver of inadmissibility under Section 212(h) or, in the alternative, the now-repealed Section 212(c) of the INA.

II. ISSUES

The issues addressed below are: 1) whether the present version of Section 212(h) of the INA applies; 2) whether the respondent is statutorily eligible for Section 212(h); and 3) whether the

respondent is entitled to apply for relief under the now-repealed Section 212(c).

III. FINDINGS AND ANALYSIS

The respondent seeks a waiver of inadmissibility under Section 212(h) or, alternatively, the now-repealed Section212(c) of the INA. Because I find him to be statutorily ineligible for a waiver under Section 212(h) and not entitled to apply for relief under the former Section 212(c), I will deny his applications.

A. Current Version of Section 212(h) Applies

As a threshold matter, I find that the respondent is subject to the version of Section 212(h) of the INA that is currently in force.

It is a well-settled principle that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 711 (1974). *See also Lara-Ruiz v. INS*, 241 F.3d 934, 945 (7th Cir. 2000) ("In applying [the repeal of Section 212(c) relief] to Lara-Ruiz' case, the BIA applied the law in effect at the time that it rendered its decision, and therefore did not violate Lara-Ruiz' due process rights."). The respondent seeks to qualify for the "manifest injustice" exception to this general principle, arguing that because Section 212(h) of the INA was different at the time or his 1983 convictions, any application of the current version to his case would have an impermissibly retroactive effect.

The respondent makes his retroactivity argument in order to avoid an unfavorable amendment to Section 212(h) of the INA in 1996. Under the prior version of the INA, Section 212(h) provided a waiver of inadmissibility for legal permanent residents ("LPRs") where a denial of admission "would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien[s]." INA § 212(h), 8 U.S.C. § 1182(h) (1990).[3] In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which narrowed the class of aliens eligible for the 212(h) waiver. Specifically, Section 348(a) of IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009 (1996), added a provision that barred any application of the waiver to LPRs who had been convicted of an aggravated felony after their admission to legal permanent residence. This amendment to Section 212(h) remains in force today and, as will be discussed below, applies to bar the respondent's application.

The respondent's retroactivity argument fails for two reasons. First, Congress has clearly expressed its intent that the current version of Section 212(h) would reach the present case. Second, even if Congress's intent were ambiguous, the respondent's argument would nonetheless fail because he has failed to identify any unfairness in applying the current version in his case.

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[3] This is the version of the INA that the respondent cites to and primarily seeks to apply here, although he reserves the right to "choose whichever prior version is favorable to him," as a matter of "equity." (*See* Resp.'s Post-trial Br. at 4-5,11.)

As the respondent acknowledges, no applicable precedent directly supports his argument. Rather, he argues that the general principles of *Landsgraf v. USI Film Products*, 511 U.S. 244 (1980), apply to prohibit the application of the current version of Section 212(h) in this case. *Landsgraf* provides a two-step test to determine whether an application of statute to past conduct is impermissibly retroactive. First, a court must consider whether Congress "expressly prescribe[d] the statute's reach." *Id.* at 285. If Congress has clearly spoken, the statute is applied as Congress directed, *Kaiser Alum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990); *Lara-Ruiz*, 241 F.3d at 943. If the statute is ambiguous as to Congress's intent, then the court must consider whether application of the statute would have an "retroactive effect," *i.e.*, "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landsgraf*, 511 U.S. at 280.

The respondent's argument fails under the first step of the *Landsgraf* analysis. Congress expressly provided that its 1996 amendment to Section 212(h) would apply to all removal proceedings pending or arising after its enactment. "The amendment . . . shall be effective on the date of enactment [of IIRIRA, September 30, 1996] and shall apply in the case of any alien who is in exclusion or deportation proceedings as of such date unless a final administrative order in such proceedings has been entered as of such date." IIRIRA § 348(b), Pub. L. No. 104-208, 110 Stat. 3009 (1996). No exception was made for cases in which an aggravated felony conviction triggering

a bar to relief arose prior to the date of enactment. This very provision has been recognized by the Supreme Court as an example of Congress's ability to speak clearly to its intent to apply a provision retroactively. *See INS v. 81. Cyr*, 533 U.S. 289, 319 n. 43 (2001) (citing IIRIRA § 348(b), in dicta, as example of unambiguous retroactivity provision, in contrast to IIRIRA § 304 (b)). "Where the congressional intent is clear, it governs." *Kaiser Alum.*, 494 U.S. at 837. Therefore, I will give effect to Congress's clearly expressed intent to apply the current version of Section 212(h) to these removal proceedings, which were initiated well after the enactment of IIRIRA.

Secondly, even if the effective date provision, Section 348(b) of IIRIRA, were ambiguous, the respondent has failed to articulate any reason that it would be unfair to apply the amendment in the present case. Central to the second step of the *Landsgraf* analysis are the notions of "fair notice, reasonable reliance, and settled expectations." *Labojewski v. Gonzales*, 407 F.3d 814, 820 (7th Cir. 2005) (quotation marks and citation omitted). Yet the respondent has failed to identify any acts of reliance or settled expectations that were upset by Congress's amendment of Section 212(h) in 1996. He has not explained how his conduct would have changed had he known that Section 212(h) would be amended. Nor does the record independently indicate any choices that potentially could have depended on the availability of Section 212(h) relief.[4] Thus, without even an inkling of

[4] The respondent's decision to commit the crime of counterfeiting, of course, would not count. *See Lara-Ruiz*, 241 F.3d at 945 (" 'it would border on the absurd' to argue

how the respondent might have conducted his affairs differently had Section 212(h) not been amended, I am unable to find any impermissibly retroactive effect in the present case.

A useful comparison may be made to *Lara-Ruiz*, in which an alien who had been convicted by a jury of a crime prior to Congress's repeal of Section 212(c) sought to argue in removal proceedings that the repeal was impermissibly retroactive as applied to his case. As the court in *Lara-Ruiz* noted, the repeal could have had a retroactive effect if the alien had taken or forgone some action in reliance (at least in part) on the potential availability of Section 212(c) relief, such as waiving a colorable defense to deportability. *Reyes-Hernandez v. INS*, 89 F.3d 490, 493 (7th Cir. 1996), or pleading guilty to a criminal offense, *St. Cyr*, 533 U.S. 289. In *Lara-Ruiz*, in contrast, the respondent.

> [did] not argue that his expectation of the availability of the waiver in any way influenced his litigation strategy either in his state criminal proceedings or in his removal proceedings. Indeed, he does not argue that he performed *any* act or gave *anything* up in reliance on the potential availability of a § 212(c) waiver. . . . Thus, Lara-Ruiz cannot seriously maintain that the application of any rule barring discretionary relief from removal would upset his settled expectations suffi-

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that an alien would refrain from committing crimes or would contest criminal charges more vigorously if he knew that after he had been imprisoned and deported, a discretionary waiver of deportation would no longer be available to him.").

> ciently to trigger the presumption against retroactivity.

241 F.3d at 945 (emphasis in original).

Similarly, in the present case, the respondent has not made any claim that his expectation that the prior version of Section 212(h) would remain unchanged somehow influenced his strategy in his criminal trial, his decision to concede removability in the current proceedings, or any other decision on his part. Therefore, as in *Lara-Ruiz*, the respondent has failed to make a colorable showing that applying the current version of Section 212(h) would have an impermissibly retroactive effect in his case.[5]

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[5] The respondent makes a brief, additional argument that it violates the Equal Protection clause to apply Section 212(h)'s aggravated felony bar to him, because the provision only applies to aliens who have been admitted to legal permanent residence. Aliens convicted of the same crime but who are non-LPRs, in contrast, would not be barred from seeking a 212(h) waiver. This very argument was considered and rejected in *Lara-Ruiz*, which held that a rational basis existed for distinguishing between aggravated felons who have previously admitted as LPRs and those who have not. "In banning only LPR aggravated felons from waiver eligibility, Congress might well have found it significant that, unlike non-LPR aggravated felons, such aliens have already demonstrated that closer ties to the United States and all of the benefits attending LPR status were insufficient to deter them from committing serious crimes." 241 F.3d at 946-48. Thus, the respondent's Equal Protection argument fails.

B. Respondent Is Statutorily Ineligible for Section 212(h) Waiver

The respondent is barred from a Section 212(h) waiver due to his 1983 conviction for counterfeiting.

As noted above, to be eligible for a waiver under Section 212(h) of the INA, an alien cannot have been convicted of an aggravated felony. INA § 212(h), 8 U.S.C. § 1182(h). Included in the INA's definition of an "aggravated felony" is "an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year." INA § 101(a)(43)(R), 8 U.S.C. § 1101(a)(43)(R).[6] The respondent's 1983 conviction for selling, exchanging, transferring and delivering false and counterfeited obligations "with the intent that the same be passed, published and used as true and

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[6] The respondent raises no challenge to the applicability of the current version of Section 101(a)(43)(R), as opposed to the former version (which only included counterfeiting offenses for which the term of imprisonment was at least *five* years). Even if he had, such a challenge would not have prevailed. The change to one year was imposed by Section 321(a)(10) of IIRIRA, which Congress expressly made applicable to "actions taken on or after the date of the enactment of this Act, regardless of when the conviction occurred." IIRIRA § 321(c). Thus, there is no question that the present proceedings fall after the effective date of the amendment. Furthermore, "it has long been recognized that Congress may deport aliens for committing crimes which were not deportable offenses at the time there committed." *Lara-Ruiz*, 241 F.3D at 945 n. 8 (citing *Marcello v. Bonds*, 349 U.S. 302, 314 (1955); *Chow v. INS*, 113 F.3D 659, 667 (7th Cir. 1997)).

genuine," in violation of 18 U.S.C. § 473, undoubtedly meets this definition. In unmistakable terms, the statute under which he was convicted describes an offense relating to counterfeiting. Further, the record of conviction indicates that for one the counts of counterfeiting, the respondent was sentenced to a term of two years' imprisonment. (*See* Ex. 2.)

Thus, because the respondent was convicted of a counterfeiting offense for which the term of imprisonment was over one year, he has been convicted of an aggravated felony and is ineligible for a waiver under Section 212(h).

C. Respondent Is Not Entitled to Apply for Section 212(c) Relief

The respondent argues that although the waiver of inadmissibility under Section 212(c) of the INA was repealed by IIRIRA effective April I, 1997, he is nonetheless entitled to apply for Section 212(c) relief because the repeal is impermissibly retroactive as applied to him.

The respondent's argument is foreclosed by *Montenegro v. Ashcroft*, 355 F.3d 1035 (7th Cir. 2004). In *Montenegro*, the Seventh Circuit held that the repeal is effective and Section 212(c) relief is no longer available to aliens whose removal proceedings were initiated after April 1, 1997 (the effective date of IIRIRA), with two limited exceptions: 1) aliens who pled guilty to an aggravated felony before the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and who would have been eligible for Section 212(c) relief at the time of their guilty plea; 2) aliens who conceded deportability before

AEDPA's enactment, with the expectation that they could seek Section 212(c) relief before the Immigration Court. The Seventh Circuit held that the respondent in *Montenegro*, whose removal proceedings were initiated after IIRIRA's effective date and who met neither of these exceptions, was ineligible to apply for 212(c) relief.

Similarly, the respondent falls under neither of these exceptions. The instant proceedings were initiated on June 15, 2005, well after the effective date of IIRIRA. The respondent never pleaded guilty to an aggravated felony; he was found guilty after a trial by jury. Nor did he concede removability before the enactment of AEDPA. Thus, his case is squarely controlled by *Montenegro*, and like the respondent in that case, he is not entitled to apply for Section 212(c) relief.

VI. CONCLUSION

The respondent is statutorily ineligible to apply for a waiver under Section 212(h), due to his conviction of an aggravated felony. He is not entitled to apply for relief under the now repealed Section 212(c). Therefore, his applications for a waiver under Sections 212(h) and 212(c) are denied.

Accordingly, the following order will be entered:

ORDER

IT IS ORDERED that the respondent's applications for a waiver of inadmissibility are DENIED and the respondent be removed to Mexico on the charges contained in the Notice to Appear.

/s/ GLEN L. BOWER
GLEN L. BOWER
IMMIGRATION JUDGE

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(2)

Supreme Court, U.S.
FILED
AUG 09 2010
OFFICE OF THE CLERK

No. 09-1333

In the Supreme Court of the United States

FERNANDO CANTO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

In 1996, Congress repealed Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), which provided for a discretionary waiver of exclusion, and replaced it with another form of discretionary relief not available to aliens convicted of certain crimes, including aggravated felonies. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that the repeal of Section 212(c) did not apply retroactively to an alien previously convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief. The questions presented are:

1. Whether this Court's holding in *St. Cyr* applies to an alien who was convicted of aggravated felony counterfeiting offenses and a firearms offense after trial, and who therefore did not relinquish his right to a trial in reliance on potential eligibility for a waiver under Section 212(c).

2. Whether, based on principles of non-retroactivity, the repeal of Section 212(c) is applicable to an alien who was convicted of aggravated felony counterfeiting offenses and a firearms offense after trial, but alleges that he relinquished his right to an appeal in reliance on potential eligibility for a waiver under Section 212(c).

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In the Supreme Court of the United States

No. 09-1333

FERNANDO CANTO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 593 F.3d 638. The decisions of the Board of Immigration Appeals (Pet. App. 15a-18a) and the immigration judge (Pet. App. 19a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2010. The petition for a writ of certiorari was filed on April 28, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some permanent resident aliens domiciled in the United States for seven consecutive years to

apply for discretionary relief from exclusion. While, by its terms, Section 212(c) applied only to exclusion proceedings, it was generally construed as being applicable in both deportation and exclusion proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

Between 1990 and 1996, Congress enacted three statutes that "reduced the size of the class of aliens eligible for" relief under Section 212(c). *St. Cyr*, 533 U.S. at 297. In the Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052, which was enacted on November 29, 1990, Congress made Section 212(c) relief unavailable to anyone who had been convicted of an aggravated felony and served a term of imprisonment of at least five years. In April 1996, in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, Congress further amended Section 212(c) to make ineligible for discretionary relief aliens previously convicted of certain criminal offenses, including aggravated felonies, irrespective of the length of the sentence served. See *St. Cyr*, 533 U.S. at 297 n.7. Later that year, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, Congress repealed Section 212(c) in its entirety, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b. The latter section now provides for a form of discretionary relief known as cancellation of removal that is not available to many criminal aliens, including those who have been convicted of an aggravated felony (which, as relevant here, includes a counterfeiting offense that results in a prison sentence of at least a year). See 8 U.S.C. 1101(a)(43)(R), 1229b(a)(3).

In *St. Cyr*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c)

should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for relief under former Section 212(c). 533 U.S. at 314-326. In particular, the Court explained that, before 1996, aliens who decided "to forgo their right to a trial" by pleading guilty to an aggravated felony "almost certainly relied" on the chance that, notwithstanding their convictions, they would still have some "likelihood of receiving [Section] 212(c) relief" from deportation. *Id.* at 325.

On September 28, 2004, after notice-and-comment rulemaking proceedings, the Department of Justice promulgated regulations to take account of the decision in *St. Cyr*. See *Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004). In its response to comments received on the proposed rule, the Department noted cases holding that "an alien who is convicted after trial is not eligible for [S]ection 212(c) relief under *St. Cyr*," and then stated that it "has determined to retain the distinction between ineligible aliens who were convicted after criminal trials[] and those convicted through plea agreements." *Id.* at 57,828. That determination is reflected in the regulations, which make aliens ineligible to apply for relief under former Section 212(c) "with respect to convictions entered after trial." 8 C.F.R. 1212.3(h).

2. a. Petitioner is a native and citizen of Mexico. Pet. App. 3a. He was admitted to the United States as a lawful permanent resident in 1971. *Id.* at 3a, 21a. In January 1982, petitioner was indicted for knowingly passing or possessing more than $144,000 in counterfeit United States currency, and for unlawfully carrying a firearm (a semiautomatic pistol) during the commission

of a felony. Administrative Record 318-325, 329. In March 1983, represented by counsel, petitioner pleaded not guilty but was convicted after a jury trial of three counts of counterfeiting offenses in violation of 18 U.S.C. 472 and 473, and of one count of unlawfully carrying a firearm during the commission of a felony in violation of 18 U.S.C. 924(c)(2) (1982).[1] Pet. App. 3a, 21a-22a. He was sentenced to two years of imprisonment. *Id.* at 3a.

b. In April 2005, petitioner visited his native Mexico. Upon his return to the United States, officers of the Department of Homeland Security determined that he was inadmissible because of his conviction for a crime involving moral turpitude. Pet. App. 3a, 20a-21a. He was placed in removal proceedings and charged with being inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(I), as an arriving alien who has been convicted of a crime involving moral turpitude. Pet. App. 3a, 20a-21a.

At hearings before an immigration judge (IJ) in 2005 and 2006, petitioner, represented by counsel, conceded that his counterfeiting offenses are crimes involving moral turpitude, but requested that the grounds of inadmissibility be waived under Section 212(h) (8 U.S.C. 1182(h)) or former Section 212(c). Pet. App. 3a, 22a. Petitioner also conceded that he had been convicted of an aggravated felony. *Ibid.* The IJ concluded that petitioner was not eligible for relief under Section 212(h) or former Section 212(c) because of his conviction for an aggravated felony, and because, unlike the alien in *St.*

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[1] Under 18 U.S.C. 924(c)(2) (1982), a person convicted of "carr[ying] a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States" was required to be sentenced to one to ten years of imprisonment in addition to the punishment for the underlying felony.

Cyr, petitioner's conviction resulted from a jury verdict rather than a guilty plea. *Id.* at 29a-31a.

c. Petitioner appealed to the Board of Immigration Appeals (Board). The Board dismissed the appeal, concluding, as relevant here, that petitioner's aggravated felony convictions made him ineligible for a discretionary waiver of inadmissibility under former Section 212(c). Pet. App. 15a-18a. The Board explained that, because petitioner's conviction followed a trial rather than a guilty plea, he could not "show[] that he affirmatively abandoned any rights in reliance on the possibility of [S]ection 212(c) relief." *Id.* at 16a (citing *United States* v. *De Horta Garcia*, 519 F.3d 658, 661 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008)). The Board also concluded that, even assuming that reliance could be established by "a sufficiently substantiated claim of having foregone [*sic*] an appeal," there was "insufficient testimony or other evidence in the record of proceedings to support" such a claim here. *Id.* at 16a-17a.

3. The court of appeals denied a petition for review. Pet. App. 1a-14a. The court first rejected petitioner's argument that the application of the aggravated felony bar-to-relief under Section 212(c) violated the equal protection component of the Due Process Clause because a foreign conviction would have been treated differently from his state conviction; the court held that it was "perfectly rational" for Congress to treat foreign convictions differently from domestic ones.[2] *Id.* at 5a.

As relevant here, the court of appeals also rejected petitioner's argument that the application of the 1996 repeal of Section 212(c) to his conviction was impermis-

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[2] Petitioner does not challenge the equal protection holding in this Court.

sibly retroactive. Pet. App. 6a-14a. The court reiterated its previous holding that "a petitioner could not possibly have relied on the continued existence of [S]ection 212(c) relief in deciding to go to trial" as opposed to admitting guilt. *Id.* at 11a (citing *Montenegro* v. *Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004)). The court also rejected petitioner's alternative argument that he could be considered to have reasonably relied on the possibility of Section 212(c) relief when he decided not to appeal his conviction. *Ibid.* The court concluded that the distinction between its analysis in *Montenegro* and that of the Third, Eighth, and Tenth Circuits is "one of fine line drawing," because each court uses a "categorical approach * * * when deciding whether an alien relied on the continued existence of [S]ection 212(c) in forgoing a legal right." *Id.* at 11a-12a.

Addressing the category of aliens who claimed reliance on the continued availability of Section 212(c) relief in making a decision not to appeal a conviction prior to IIRIRA, the court of appeals explained that *St. Cyr*'s logic "cannot necessarily be extended to those aliens convicted at trial." Pet. App. 13a. The court observed that "[i]t is a stretch to think" that aliens who had gone to trial and received sentences of less than five years would "forgo their right to appeal on the off chance that they would be successful, get retried, be convicted again, and then receive a sentence greater than five years." *Id.* at 13a-14a. It thus affirmed the Board's decision that petitioner was ineligible for discretionary relief under former Section 212(c).

ARGUMENT

Petitioner contends (Pet. 9, 22) that *INS* v. *St. Cyr*, 533 U.S. 289 (2001), which involved an alien convicted of

an aggravated felony after a plea agreement, has been misinterpreted by the majority of the courts of appeals and that the availability of relief under former Section 212(c) of the INA should be extended to any alien found guilty of a deportable offense after a jury trial, because retroactivity analysis should not include any consideration of likely reliance. In the alternative, petitioner suggests (Pet. 12), as he argued in the court of appeals, that his decision to forgo an appeal of his conviction "was sufficient to trigger Section 212(c) relief."

The decision of the court of appeals does not warrant further review because petitioner's arguments lack merit. The courts of appeals have correctly recognized that reliance is a significant factor to be considered for purposes of retroactivity analysis, although it may be given different weight in different circuits and there is some variation about whether the requisite reliance must be actual (as opposed to objectively reasonable) reliance. Moreover, petitioner's claim that he could have relied on the availability of Section 212(c) relief when he chose not to appeal his conviction is simply implausible. Finally, the underlying question involves the retroactive effect of a statutory repeal that occurred 14 years ago, and this Court has repeatedly denied petitions urging a similar extension of *St. Cyr*. See, *e.g.*, *De Johnson* v. *Holder*, 130 S. Ct. 3273 (2010); *Molina-De La Villa* v. *Holder*, 130 S. Ct. 1882 (2010); *Ferguson* v. *Holder*, 130 S. Ct. 1735 (2010); *Cruz-Garcia* v. *Holder*, 129 S. Ct. 2424 (2009); *Aguilar* v. *Mukasey*, 128 S. Ct. 2961 (2008); *Zamora* v. *Mukasey*, 553 U.S. 1004 (2008); *Hernandez-Castillo* v. *Gonzales*, 549 U.S. 810 (2006); *Thom* v. *Gonzales*, 546 U.S. 828 (2005); *Stephens* v. *Ashcroft*, 543 U.S. 1124 (2005); *Reyes* v. *McElroy*, 543 U.S. 1057 (2005);

Lawrence v. *Ashcroft*, 540 U.S. 910 (2003); *Armendariz-Montoya* v. *Sonchik*, 539 U.S. 902 (2003).

1. Petitioner contends (Pet. 19-22) that the court of appeals "and several of its sister circuits" are in conflict with this Court's retroactivity analysis. Quoting the Third Circuit's decision in *Atkinson* v. *Attorney General*, 479 F.3d 222, 230 (2007) as a model, petitioner argues (Pet. 22) that the court below erred "by focusing on whether [petitioner] relied on existing law, rather than finding that new 'legal consequences' attached to [his] existing rights." Petitioner's objection lacks merit. As this Court has explained, in determining whether a statute has a retroactive effect, a court must make a "commonsense, functional judgment" that "should be informed and guided by 'familiar considerations of fair notice, *reasonable reliance*, and settled expectations.'" *Martin* v. *Hadix*, 527 U.S. 343, 357-358 (1999) (emphasis added) (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994)).

In *St. Cyr* itself, this Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." 533 U.S. at 321-322 (citation and internal quotation marks omitted). In light of "the frequency with which [Section] 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because the Court concluded that aliens in St. Cyr's position "almost certainly relied upon th[e] likeli-

hood [of receiving Section 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of [Section] 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325. Thus, the likelihood of reliance played an important role in the Court's decision in *St. Cyr*. Petitioner's contrary view—that the prospect of reliance is irrelevant—would make the Court's analysis of guilty pleas in *St. Cyr* superfluous.

In asserting that the court of appeals misinterpreted *St. Cyr*, petitioner relies principally (Pet. 21) on two of this Court's retroactivity cases: *Landgraf* and *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997). Those cases, however, do not support petitioner's arguments. In *Landgraf*, the Court specifically identified "reasonable reliance" as a consideration that "offer[s] sound guidance" in evaluating retroactivity, 511 U.S. at 270, and it quoted that same proposition from *Landgraf* in *St. Cyr*, 533 U.S. at 321, which was decided well after *Hughes Aircraft*. Nothing in *St. Cyr* suggested that any alien who was eligible for Section 212(c) relief before its repeal would remain forever eligible. To the contrary, the Court held that Section "212(c) relief remains available for aliens, *like respondent, whose convictions were obtained through plea agreements* and who, notwithstanding those convictions, would have been eligible for [Section] 212(c) relief at the time of their plea under the law then in effect." *Id.* at 326 (emphasis added).

Moreover, this Court's most recent decision addressing retroactivity in the immigration context explicitly discussed *St. Cyr* and reconfirmed the importance of reliance. In *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006), the Court stated that *St. Cyr* "emphasized that

plea agreements involve a *quid pro quo* * * * in which a waiver of constitutional rights * * * had been exchanged for a perceived benefit * * * valued in light of the possible discretionary relief, a focus of expectation and reliance." *Id.* at 43-44 (citations and internal quotation marks omitted). Distinguishing the situation of the alien in *Fernandez-Vargas* from that of the alien in *St. Cyr*, the Court remarked that, "before IIRIRA's effective date Fernandez-Vargas never availed himself of [provisions providing for discretionary relief] or took action that enhanced their significance to him in particular, as *St. Cyr* did in making his *quid pro quo* agreement." *Id.* at 44 n.10.

Thus, the court of appeals did not err in considering the prospect of reasonable reliance as part of its "commonsense, functional judgment" about retroactivity. *Martin*, 527 U.S. at 357.[3]

2. Petitioner contends (Pet. 9-16) that there is a significant and entrenched conflict among the circuits about the proper interpretation of this Court's *St. Cyr* decision. But the disagreement in the analysis of the circuits is—as the decision below recognized (Pet. App. 11a)—narrow. Nine circuits have declined to extend the holding of *St. Cyr* as a general matter to aliens who were convicted after going to trial rather than pleading guilty. See *Dias* v. *INS*, 311 F.3d 456, 458 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Rankine* v. *Reno*, 319 F.3d 93, 102 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Mbea* v. *Gonzales*, 482 F.3d 276, 281-282 (4th Cir. 2007); *Hernandez-Castillo* v. *Moore*, 436 F.3d 516, 520 (5th Cir.), cert. denied, 549 U.S. 810 (2006); *Kellermann* v.

[3] Petitioner does not challenge the court of appeals' employment (Pet. App. 11a) of a categorical approach as opposed to an individualized, case-by-case analysis of reliance.

Holder, 592 F.3d 700, 705-706 (6th Cir. 2010); *United States* v. *De Horta Garcia*, 519 F.3d 658, 661 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008); *Hernandez de Anderson* v. *Gonzales*, 497 F.3d 927, 940 (9th Cir. 2007); *Hem* v. *Maurer*, 458 F.3d 1185, 1189 (10th Cir. 2006); *Ferguson* v. *United States Att'y Gen.*, 563 F.3d 1254, 1259-1271 (11th Cir. 2009), cert. denied, 130 S. Ct. 1735 (2010). Two circuits have held that no showing of reliance is required and that new legal consequences attached by IIRIRA to an alien's conviction were sufficient to prevent the Board from precluding Section 212(c) relief. See *Atkinson*, 479 F.3d at 231 (3d Cir); *Lovan* v. *Holder*, 574 F.3d 990, 994 (8th Cir. 2009) (following *Atkinson* with little further analysis).

In *Atkinson*, the Third Circuit retreated from dictum in *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (2004), which had suggested that an alien who had not been offered a guilty plea would be unable to establish reliance for purposes of retroactivity analysis, *id.* at 494. The Third Circuit in *Atkinson* held that the repeal of Section 212(c) should not be construed to apply retroactively to "aliens who, like Atkinson, had not been offered pleas and who had been convicted of aggravated felonies following a jury trial at a time when that conviction would not have rendered them ineligible for [S]ection 212(c) relief." 479 F.3d at 229-230.

The *Atkinson* court's analysis was based on the observation that this Court "has never held that reliance on the prior law is an element required to make the determination that a statute may be applied retroactively." 479 F.3d at 227-228. But that result cannot be squared with the rationale of *St. Cyr*, which specifically identified "reasonable reliance" as an important part of the "commonsense, functional judgment" in retroactivity analy-

sis, and then explicitly rested its holding on the assessment that it was likely that aliens who pleaded guilty prior to 1996 had reasonably relied on the possible availability of Section 212(c) relief. See 533 U.S. at 321-323. If the Third Circuit's view that retroactivity analysis turns on the fact of conviction simpliciter were correct, then that entire discussion in *St. Cyr* was superfluous.

Furthermore, the Court's analysis in *St. Cyr* was focused on the prospect of detrimental reliance by an alien who pleaded guilty between 1990, when Congress enacted the bar to Section 212(c) relief for aliens who served more than five years on a sentence for an aggravated felony, and 1996, when Congress repealed Section 212(c) altogether. See 533 U.S. at 293 (describing the facts of *St. Cyr*'s case); *id.* at 297 (describing 1990 enactment); *id.* at 323 (describing circumstances of an alien whose "sole purpose" in plea negotiations was to "ensure" a sentence of less than five years). During that six-year period, from 1990 to 1996, an alien concerned about preserving eligibility for relief under Section 212(c) would have had an incentive to enter into a plea agreement that provided for a sentence of five years or less, rather than go to trial and risk a longer (and disqualifying) sentence, and accordingly may have developed reasonable reliance interests. The aliens in the Third Circuit's decision in *Atkinson* and the Eighth Circuit's decision in *Lovan* were also both convicted after the 1990 narrowing of Section 212(c) relief on the basis of sentence length, on which this Court focused in *St. Cyr*. See *Atkinson*, 479 F.3d at 224; *Lovan*, 574 F.3d at 992.

Petitioner, by contrast, was convicted in 1983—long before the 1990 amendment made the length of a sentence a bar to eligibility for Section 212(c) relief. See

Pet. App. 3a. And he does not contest that his conviction of three felonies made him deportable. See Pet. 2. As a result, preserving eligibility for relief under Section 212(c) could not reasonably have been expected to play any role in his strategic decision about whether to appeal.

In any event, the deviation in the circuits' analysis is narrow, because the Third Circuit nonetheless acknowledged that reliance is "but one consideration." *Atkinson*, 479 F.3d at 231. As a result, its split from the other circuits' analysis extends only to whether a determination of retroactive effect *must* turn on the prospect of reliance. No circuit has denied that a determination of retroactive effect *may* be based on the prospect of reliance. Thus, the court of appeals correctly concluded here that the distinction between its analysis and that of the Third and Eighth Circuits "is one of fine line drawing." Pet. App. 11a.

3. Although petitioner's principal argument concerns the distinction between pleading guilty and going to trial, he also suggests (Pet. 12) that he would prevail under the Tenth Circuit's finding in *Hem*, *supra*, that an alien could establish reliance by focusing on his decision not to appeal a conviction. As the court of appeals concluded, the distinction petitioner seeks to draw with respect to the Tenth Circuit's decision in *Hem* is also "one of fine line drawing." Pet. App. 11a. In any event, petitioner's circumstances are quite distinct from those of the alien in *Hem*, where the alien made an objectively reasonable decision to forgo a right to an appeal that would have put him "at risk of being sentenced to a sentence longer than 5 years * * * making him ineligible for [Section] 212(c) relief" after 1990. 458 F.3d at 1199.

In the court of appeals, petitioner argued that he "could have reasonably been motivated by the availability of [Section] 212(c) relief" when he decided not to appeal because he could "have faced a prison sentence up to 20 years if he were to be reconvicted on the [same] offenses [following appeal]." Pet. C.A. Br. 24-25 (capitalization modified). The court of appeals correctly concluded that "[i]t is a stretch to think" that petitioner might have been motivated to forgo an appeal by the risk of receiving a sentence greater than five years after a successful appeal. Pet. App. 13a-14a. In this case, moreover, even that hypothetical risk would have been entirely irrelevant to petitioner's evaluation of whether to appeal his 1983 conviction, because the five-year-imprisonment ceiling was not added to Section 212(c) until 1990, seven years later. See p. 2, *supra*. Accordingly, petitioner can point to no act or transaction that raises even the prospect of reasonable reliance in his case.[4]

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[4] If petitioner had been considering the availability of Section 212(c) relief in a future deportation proceeding at the time of his criminal proceedings, he might have attempted to plead guilty to the counterfeiting offenses in order to avoid being convicted for unlawful possession of a semiautomatic pistol. Petitioner's firearms conviction could have been expected to result in a charge of deportability under 8 U.S.C. 1251(a)(14) (1982) (applying to those "convicted of possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semiautomatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun"). In such a proceeding, petitioner would have been ineligible to seek Section 212(c) relief long before its 1996 repeal, because that ground of deportation did not have a statutory counterpart among the grounds of exclusion. See *In re Montenegro*, 20 I. & N. Dec. 603, 604-605 (B.I.A. 1992) ("[T]here is no corresponding exclusion ground to the charge of deportability under section 241(a)(2)(C) of the [INA] (previously 241(a)(14) [8 U.S.C. 1251(a)(14)]). Accordingly,

4. Petitioner contends (Pet. 16) that this case presents "[a]n [i]ssue [o]f [n]ational [i]mportance." In fact, however, the issue is of quite limited prospective importance because it pertains to the retroactive effect of a statutory amendment to former Section 212(c) that occurred 14 years ago.

Petitioner notes (Pet. 18) the existence of "numerous decisions among the circuits over the last eight years." But, as the government explained in its brief opposing certiorari (at 15-17) in *Ferguson* v. *Holder*, cert. denied, 130 S. Ct. 1735 (2010) (No. 09-263), those decisions are not a reliable indication of the issue's continuing importance, because the great majority of them involved immigration proceedings that were initiated before *St. Cyr*.

Petitioner also cites (Pet. 16-17) statistics from *St. Cyr* about the frequency with which Section 212(c) relief was granted before 1996, and other statistics about the number of removal proceedings initiated in recent years against criminal aliens. As a general matter, however, the number of grants of relief under former Section 212(c) has declined dramatically in each year since the

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we * * * conclude that the respondent is not eligible for a waiver under section 212(c)."); *In re Granados*, 16 I. & N. Dec. 726, 729 (B.I.A. 1979) ("[W]e conclude that the respondent's conviction for possession of an unregistered sawed-off shotgun does not come within the grounds of excludability which are subject to a section 212(c) waiver."). Although petitioner's counterfeiting offenses were crimes involving moral turpitude (which would not have precluded eligibility for Section 212(c) relief in 1983), petitioner could also have sought relief from deportation directly from the criminal court, in the form of a Judicial Recommendation Against Deportation. See 8 U.S.C. 1251(b)(2) (1982) (repealed 1990); *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1479-1480 & n.5 (2010). Petitioner has not addressed how the firearms charge and conviction would affect his reliance arguments.

2004 promulgation of the regulation implementing *St. Cyr*: by 55% (from 1905 grants to 858 grants) between FY 2004 and FY 2009. See Exec. Office for Immigration Review, U.S. Dep't of Justice, *FY 2008 Statistical Year Book*, Table 15, at R3 (2009), http://www.justice.gov/eoir/statspub/fy08syb.pdf; Exec. Office for Immigration Review, U.S. Dep't of Justice, *FY 2009 Statistical Year Book*, Table 15, at R3 (2010), http://www.justice.gov/eoir/statspub/fy09syb.pdf. Over that same period, the number of applications for relief under former Section 212(c) fell at an even greater rate. In FY 2004, there were 2617 applications; in FY 2008, there were 1281; and in FY 2009, there were 576. That reflects a 78% decline since FY 2004—and a 55% decline just since FY 2008. Moreover, because most criminal defendants plead guilty (see Pet. 17 n.3; *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1485 (2010)), the number of aliens affected by the general rule in the circuits that Section 212(c) does not apply to an alien who was convicted after a trial, therefore, would be only a small fraction of those numbers.[5] Finally, because green cards issued after 1989 expire after ten years, see 54 Fed. Reg 47,586 (1989), nearly all lawful permanent residents who are removable on the basis of pre-IIRIRA convictions (even those who did not leave and re-enter the United States) have already been exposed to immigration authorities at some point since

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[5] Cf. *Ponnapula*, 373 F.3d at 496 n.16 ("[I]n comparison to the holding in *St. Cyr*, the effect of our overall holding is likely to be small. First, the class of aliens affected by this ruling is constantly shrinking in size as the effective date of IIRIRA recedes into the past. Second, * * * many aliens who are within the scope of this holding will nonetheless be statutorily ineligible for [Section] 212(c) relief by reason of having served five years or more in prison. Third, many times more criminal defendants enter into plea agreements than go to trial.").

2000. That shrinks even further the pool of those who might still have new proceedings initiated against them on the basis of pre-1996 convictions.

Thus, there is still every reason to believe that this is an issue of diminishing prospective importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2010

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(3)

No. 09-1333

Supreme Court, U.S.
FILED
AUG 23 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FERNANDO CANTO,

Petitioner,

—v.—

ERIC H. HOLDER, Attorney General of the United States,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Petitioner's Reply Brief

The Government attempts to show that the circuits are harmonious on the ongoing availability of Section 212 relief despite the fact that the circuit courts have fragmented into multiple camps with contradictory legal tests. In most cases, including the decision by the Court of Appeals below, the circuits have reached the wrong result, requiring Section 212 petitioners to make a particularized showing that they relied upon the existence of Section 212 relief. A case-by-case assessment of individual reliance has never been required by this Court's retroactivity jurisprudence.

The Government can point only to dicta to support its case-by-case stance. No sense can be made of the pastiche of legal standards that have developed on this issue. Certiorari should be granted to correct the erroneous standard adopted by many of the circuits, which improperly limits the relief available to Mr. Canto and the thousands that are similarly situated to him.

I. THE GOVERNMENT CANNOT RATIONALIZE THE DISPARATE RESULTS REACHED BY THE CIRCUITS

The circuits are deeply split on whether and how to assess individual reliance in the context of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") retroactivity. This split will lead to irreconcilable results going forward if certiorari is not granted. Pet'r Br. at 9-16. First,

there is a division between circuits that do not incorporate individual reliance in their retroactivity analysis at all, such as the Third, Eighth Circuits, as well as a panel on the Fourth Circuit, and those that do.[1] Pet'r Br. at 10-15. Further, even amongst the 'reliance' circuits, there is a split between whether a defendant's failure to take a guilty plea constitutes a lack of reliance per se or whether a case-by-case assessment where no plea is taken is warranted. Id. Finally, there is a division between whether a Section 212 petitioner must show he 'actually' relied upon the availability of this relief or whether reliance should be inferred under an 'objective' test. *Id.* at 11-14.

The Government does not seriously dispute the disparate tests fashioned below, but rather attempts to trivialize this division by arguing that many of the circuits have incorporated individual reliance in

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[1] The Government argues that the Third and Eighth Circuits have fashioned tests for retroactivity that look to an individual's reliance as one factor in determining whether a statute is retroactive. Opp. Br. at 11-12. This assertion is incorrect, as the Third Circuit in *Atkinson v. United States* expressly found, Section 212 remained available despite concluding that the *Atkinson* petitioner did not rely on the ongoing availability of Section 212 in declining to enter into a plea agreement. 479 F.3d 222, 231 (3d Cir. 2007) ("We agree that aliens who were not offered plea bargains did not rely on the existence of section 212(c) relief in deciding to go to trial. This does not cause us pause, however, because the relevant question is whether IIRIRA attached new legal consequences to those aliens' convictions and resulting sentences. The answer, as we have described, is yes.") More to the point, even if the Third and Eighth Circuits "may consider" reliance as a factor in retroactivity analysis, this still represents a split from the other circuits that ***require*** individual reliance.

their tests for retroactivity. Opp. Br. at 13. This observation is inaccurate. As a threshold matter, that many circuits have incorporated reliance tests militates in favor of certiorari as such tests misapply this Court's retroactivity precedent. Infra at 3-7. Further, even assuming that individual reliance plays some role in determining Section 212 availability, there is a significant difference between an 'actual reliance' and 'objective reliance' standard, as the 'actual reliance' tests require assessment of a petitioner's state of mind that require probing privileged conversations with counsel during the formation of the petitioner's criminal defense strategy, whereas the 'objective reliance' tests look to external factors from which reliance may be inferred. These different analyses will lead to disparate results going forward and, on a practical level, will necessarily be fraught with administration issues yielding unpredictable, nonuniform results as seen in the decisions by the circuit courts below.[2]

II. THE GOVERNMENT CONTRADICTS THIS COURT'S RETROACTIVITY PRECEDENT

Mr. Canto demonstrated that this Court's precedents have maintained a strong "presumption against retroactive legislation" that "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI*

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[2] For example, an 'actual reliance' rule would almost certainly require courts to probe privileged discussions between a criminal defendant and his or her trial counsel to determine the extent to which a criminal defendant 'actually relied' upon existing law in crafting trial strategy.

Film Products, 511 U.S. 244, 265 (1994). Under Landgraf, the analysis of whether a statute is retroactive consists of only two factors: (1) whether Congress intended retroactive application of the statute; and (2) whether applying the law retroactively "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. The 1990 and 1996 legislative repeals of Section 212 relief do not contain any expression that Congress intended their retroactive application. Neither the Government nor any of the circuit decision below argue otherwise. Thus, the only issue under this Court's jurisprudence is whether the retroactive application of these repeals "would impair rights a party possessed," or to put it as this Court did in *INS v. St. Cyr*, whether it would "impair rights under existing laws." 533 U.S. 289, 321 (2001).

Retroactive repeals of a right to apply for Section 212 relief plainly 'impair' that right. As this Court has just found, IIRIRA has effectively mandated that an immigrant that is convicted of a deportable offense will face deportation whereas that was not the case prior to the Act's 1996 enactment. *Padilla v. Kentucky*, 130 S.Ct. 1473, 1480 (Mar. 31, 2010). Indeed, in light of the undeniably severe harm that deportation causes to a deportee, this Court has concluded that accurate advice regarding deportation is a Sixth Amendment right for every affected individual. Id. at 1482. The analysis in Padilla bears on the issue here, as there is no serious question retroactive application of IIRIRA to Mr. Canto impairs his rights by making the serious

consequence of deportation a certainty. As such, Mr. Canto, and those similarly situated to him, should retain their right to seek Section 212 relief. No further case-by-case test for individual 'reliance' on prior law is sanctioned by this Court's precedent or appropriate in light of the strong presumption against retroactivity.[3]

The Government argues that since some circuits have fashioned tests requiring individual reliance, certiorari need not be granted. Opp. Br. at 13. The opposite is true. The fact that the circuits are applying divergent versions of a reliance test calls out for intervention by this Court. Many of the circuit decisions show a widespread misapplication of this Court's retroactivity precedent that should be corrected. The Government relies upon dicta by this Court in *St. Cyr* to justify the 'reasonable reliance' test adopted by the Court of Appeals. *Id.* at 8-10. Specifically, the Government claims that the discussion by this Court regarding the plea agreement entered into by the petitioner in *St. Cyr* shows that this Court authorized a case-by-case reliance approach. Id. However, nothing in the discussion of the plea agreement in *St. Cyr* purported to overturn the retroactivity analysis set forth in *Landgraf* or otherwise impact the longstanding presumption against retroactivity. [4]

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[3] The Government suggests that Mr. Canto takes no issue with a case-by-case rule of reliance. Opp. Br. at 10n8. That is incorrect. Pet'r Br. at 19-22.

[4] Further, as the Government has noted, the plea agreement in *St. Cyr* came after the 1990 amendment to Section 212, which made the fact that the *St. Cyr* petitioner had obtained a

See St. Cyr, 533 U.S. at 315-16.

The Government also relies upon a discussion of *St. Cyr* in *Fernandez-Vargas v. Gonzalez* that they claim supports a reading that *St. Cyr* requires an assessment of individual reliance on Section 212. Opp. Br. at 9-10 (citing 548 U.S. 30 (2006)). This analysis fails because *Fernandez-Vargas* is factually distinguishable. The conduct in that case was ongoing at the time that the IIRIRA provisions at issue were promulgated. *Fernandez-Vargas*, 548 U.S. at 44-46. The Court cited *St. Cyr* to draw a distinction between pre-IIRIRA conduct that should not be subject to retroactive application of the statute, such as Mr. Canto's vested eligibility under Section 212 at the time of his 1983 convictions, as opposed to ongoing conduct that continued after the enactment of the IIRIRA and therefore did not involve retroactive application of the statute.[5] *Id.*

Finally, the Government asserts that *St. Cyr* does not apply to Mr. Canto because his conviction came before the 1990 amendment to Section 212, unlike the petitioner in *St. Cyr*. Opp. Br. at 12. That two amendments took place between Mr. Canto's

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conviction of less than five years material to the question of whether he would have been eligible for Section 212 relief but for the subsequent enactment of the IIRIRA. *St. Cyr*, 533 U.S. at 314-15. This is irrelevant to the question presented here, as there is no question that Mr. Canto would be eligible for Section 212 relief but-for the IIRIRA.

[5] Further, in *Fernandez-Vargaz*, this Court found that Congress intended that the relevant IIRIRA provision reached the conduct at issue in that case. 548 U.S. at 39-42. This further distinguishes *Fernandez-Vargas* from the case at bar.

convictions and his order of deportation does not change the fact that Mr. Canto has found his rights limited under retroactive application of the IIRIRA. Accordingly, this Court's intervention is necessary to correct the application of the individualized 'reasonable reliance' test adopted by the Court of Appeals.

III. THIS ISSUE AFFECTS THOUSANDS EVERY YEAR AND WILL CONTINUE TO DO SO

Mr. Canto's case comes before this Court from convictions imposed twenty-seven years ago. There is no reason to suspect that the pipeline of cases bearing similar facts will empty anytime soon give that the retroactivity issues presented in this petition apply to criminal convictions up to the 1996 IIRIRA repeal of Section 212. [6] Even one unwarranted deportation of an individual that should be eligible for Section 212 relief should merit certiorari. Many thousands of such cases certainly do.

To downplay the magnitude of this issue, the Government notes a decline in Section 212 petition grants since the time the Department of Justice implemented rules that made Section 212 available only following certain types of guilty pleas. Opp. Br. at 15-17. The statistics relied upon by the Government are highly suspect. The figures show

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[6] This Court is seeing this pipeline first-hand given that this is at least the twelfth petition on this issue the Court has received since *St. Cyr*. Opp. Br. at 7-8.

substantial variation in reported Section 212(c) grants for a given year across different reporting periods. As but one example, 2007 Department of Justice data recorded only 392 grants for 2004, but 2008 data, recorded 1,905 grants for the same year.[7] This reported five-fold increase in Section 212 grants reported for 2004 between 2007 and 2008 hardly supports the Government's claim that this problem is diminishing, nor does it indicate that the government's data is a reliable bellwether on this issue. The Government's data also shows a high degree of variability from year to year, again defying the Government's argument that this issue is diminishing over time. For example, the 2009 data (which of course may be revised substantially in subsequent years), shows that the number of Section 212 applications actually increased from 2005 to 2006, and dropped less than three percent from FY 2006 to 2007. *See* Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2009 Statistical Year Book R3 (2010) at Table 15, http://www.justice.gov/eoir/statspub/fy09syb.pdf (last visited Aug. 23, 2010). This data reveals only volatility, not any meaningful trends.

Even with the 'decline' the Government argues exists, the figures it relies upon show that well over

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[7] *Compare* Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2007 Statistical Year Book R3 (2008) at Table 15, *available at* http:// www.justice.gov/eoir/statspub/fy07syb.pdf (last visited Aug. 23, 2010), with Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2008 Statistical Year Book R3 (2009) at Table 15, http://www.justice.gov/eoir/statspub/fy08syb.pdf (last visited Aug. 23, 2010).

fifteen hundred Section 212 petitions have been received by the Department in 2009 alone. Opp. Br. at 16. In any event, a decline in Section 212 grants is unsurprising since, under the Department's newly-implemented guidelines, Section 212 relief is only available in the narrow class of cases where a petitioner enters into certain types of plea agreements. *Id.* at 3. Moreover, the publication of the Department's strict requirements for Section 212 availability has likely deterred applications for Section 212 relief by any potential petitioners that do not fall within the narrow eligibility criteria adopted by the Department. None of these statistics means that the affected class of potential petitioners has diminished over time.

Additionally, this petition comes five years following the initiation of removal procedures against Mr. Canto, meaning there is at least a five year backlog of removal procedures that may implicate Section 212 issues that are unaccounted for at this time. There is every reason to suspect that reporting from this backlog (as well as figures from future years) will show a rise in removal proceedings raising Section 212 issues given recent changes in Government policy. For example, the Department of Homeland Security has issued proposed rules that would require lawful permanent residents issued non-expiring green cards to apply for renewable cards. *See* Application Process for Replacing Forms I-551 Without an Expiration Date, 72 Fed. Reg. 46922-01 (Aug. 22, 2007). This new regulation would permit background checks on applicants that could lead to removal procedures against individuals found to have committed crimes

in the past.[8] *Id.* at 46923-24. Similarly, the new "Secure Communities" initiative, which is being rolled out between 2009, and 2013, will also ultimately result in immigration and background checks for everyone brought to a county jail.[9] The imminent increase in background checks on lawful permanent residents in both programs is more likely lead to an increased incidence of Section 212 issues, not a reduction as the Government claims.

The Government cannot rebut Mr. Canto's showing that the issues presented here are significant and of great concern for an affected class of thousands of long-settled immigrants throughout this country and are likely to continue to reach the courts in the coming years. The jumbled results reached by the circuits below provide an unsatisfactory answer for these individuals, who are leading productive lives and have formed strong roots within their communities and should not be burdened with the extreme sanction of deportation where Section 212 relief was available.

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[8] This program appears to have begun only in 2006 as the first set of procedures for the program were issued in June, 2006. *See* Interoffice Memorandum from Michael L. Aytes, Assoc. Dir. Of Domestic Operations, U.S. Citizenship and Immigration Servs., U.S. Dep't of Homeland Sec., to Reg'l, Dist., Field Office and Serv. Ctr. Dirs. and Nat'l Benefits Ctr. Dr. (May 11, 2007), *available at* http://www.uscis.gov/files/pressrelease/I90EPSNS051107.pdf (last visited Aug. 23, 2010).

[9] See U.S. Immigration and Customs Enforcement, Secure Communities, http://www.ice.gov/secure_communities/deployment/ (last visited Aug. 23, 2010).

IV. MR. CANTO'S WAIVER OF HIS APPEAL DEMONSTRATES RELIANCE ON EXISTING LAW

The Government is incorrect in arguing that Mr. Canto's waiver of his right to appeal his criminal trial verdict can not constitute reliance on existing law. Opp. Br. at 13-14. Mr. Canto's waiver of his appeal caused him to give up a significant legal right to secure a relatively short two year conviction and remain eligible for Section 212 relief. Further, it avoided the expense of an appeal and post-appeal proceedings for the Government. This was a quid-pro-quo exchange of the same type as the quid-pro-quo exchange discussed by this Court in the context of a plea agreement in *St. Cyr*.

The Government suggests that Mr. Canto did not rely upon existing law in waiving his appeal, arguing that because Mr. Canto's 1983 convictions "were not subject to the five year imprisonment ceiling" put in place in 1990, he did not sufficiently rely on the availability of Section 212 relief in waiving his appeal. In Mr. Canto's case, however, it made perfect sense to forego an appeal given the relatively short term of his sentence and the fact that he remained eligible for Section 212 relief. Pet'r Br. at 7. His waiver shows reliance on existing law, including Section 212, and the Court of Appeals' failure to consider it as such is an additional error that this Court should correct.

V. CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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August 23, 2010

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www.recordpress.com